( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

JOHN ROCK

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE FIRST DISTRICT OF THE STATE OF ILLINOIS AND/OR TO THE SUPREME COURT OF THE STATE OF ILLINOIS

INDEX

	Original	Print
Proceedings in supreme court of Illinois	1	1
Caption (omitted in printing)	1	
Record from circuit court of Cook County	3	1
Caption (omitted in printing)	3	
Praecipe for summons (" " ")	4	
Summons and sheriff's return (" " ")	5	
Declaration	6	2
Appearance (omitted in printing)	13	
Plea	14	8
Stipulation re additional plea and order thereon	15	9
Additional plea	17	9
Replication	18	10
Minute entries of trial	19	10
Verdict	21	11

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 10, 1928

	Original	Print
Judgment	22	12
Bond on appeal (omitted in printing)	23	
Stipulation re bill of exceptions	27	13
Notice of motion for approval of bill of exceptions	28	13
Order approving bill of exceptions	29	14
Bill of exceptions	31	14
Caption	31	14
Appearances of counsel	31	14
Testimony of John J. Rock	31	14
Charles D. Anderson	65	45
John J. Rock (recalled)	70	50
J. C. Lippman	78	58
James Eade	87	67
Colloquy between court and counsel	93	72
Motions for directed verdict	94	73
Testimony of L. E. Loomis	102	77
Defendant's Exhibit 1—Map showing east portion of yard	104	78
Testimony of John P. O'Hare	107	81
Ernest Rodgers	133	105
Joseph Heany	139	109
George Durado	150	119
Joseph M. Echa	172	140
John B. Hamilton	184	151
Charles E. McCarty	187	153
John Henry Banning	192	158
Charles L. Simpson	196	161
D. Smith	202	167
George A. Gary	206	171
John J. Burns	214	178
Offer in Evidence—General rules	219	182
Testimony of John D. Fitzgerald	221	183
Harry Cutler	233	196
Otis Hudson	242	203
Richard G. Hawley	263	223
Jerry O'Connor	277	235
Charles J. Ray	280	240
John J. Rock (recalled)	290	254
Motions for directed verdict (copy) (omitted in printing)	297	
Plaintiff's requested instructions to jury given	307	255
Plaintiff's requested instructions to jury refused	315	259
Defendant's requested instructions to jury given	316	260
Defendant's requested instructions to jury refused	323	263
Verdict	326	264
Minute entries	327	264
Order settling bill of exceptions	328	265
Stipulation re bill of exceptions	329	266
Clerk's certificate (omitted in printing)	330	

	Original	Print
Record from appellate court of Illinois	331	206
Assignments of error	331	206
Additional assignment of error	335	269
Clerk's certificate (omitted in printing)	336	
Caption (omitted in printing)	340	
Order assigning cause	341	270
Order extending time	342	270
Minute entry of submission (omitted in printing)	342	
Order allowing motion for leave to assign additional errors	343	270
Orders extending time	344	271
Judgment	345	272
Order staying mandate	346	272
Clerk's certificate (omitted in printing)	347	
Assignments of error	348	273
Petition for writ of certiorari	349	275
Order denying certiorari	349½	291
Clerk's certificate (omitted in printing)	350	
Opinion, Scanlon, J., appellate court (copy) (omitted in printing)	351	
Order allowing certiorari		292

[fols. 1 & 2] [Captions omitted]

[fol. 3] UNITED STATES OF AMERICA,
STATE OF ILLINOIS,
County of Cook, ss:

Pleas before the Honorable Walter Brewer Judge of the Fifth Judicial District of the State of Illinois, holding a branch of the Circuit Court of Cook County, at the request of the Judges of said Circuit Court, at a term thereof begun and holden at Chicago, in the Court House, in said County and State, on the third Monday (being the 20th day) of December in the year of Our Lord one thousand nine hundred and 26 and of the Independence of the United States the one hundred and Fifty First.

Present: Honorable Walter Brewer Judge of the Fifth Judicial District of the State of Illinois, holding a branch of the Circuit Court of Cook County, State of Illinois.

Robert E. Crowe, State's Attorney. Peter M. Hoffman, Sheriff.

Attest: Thomas O. Wallace, Clerk.

Be it remembered that heretofore, to-wit, on the 9th day of February A. D. 1925, a certain Praecipe was filed in the office of the Clerk of said Court in words and figures following, to-wit:

[fol. 4] Praecipe for summons omitted in printing.

[fol. 5] Summons and sheriff's return omitted in printing.

[fol. 6]

IN CIRCUIT COURT OF COOK COUNTY

No. B 117,411

JOHN ROCK, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY CO., a Corporation, Defendant

DECLARATION—Filed March 21, 1925

Now comes John Rock, plaintiff, by H. H. Patterson, his attorney, and complains of Minneapolis, St. Paul & Sault Ste. Marie Railway Co., a corporation, defendant, of a plea of trespass on the case.

For that whereas on, to wit, December 31st, 1924, the defendant was a common carrier by railroad engaging in interstate commerce in and between the State of Illinois and various other states of the United States; that as such common carrier defendant was in possession, control of and using certain railroad tracks at or near the place known as Kolze, Illinois, said tracks constituting what is known as a yard; that in said yard the defendant on, to-wit, the date aforesaid moved and switched certain cars, some of which contained interstate freight and merchandise and all of which were so moved by defendant in interstate commerce on, over and along said tracks there; that on, to-wit, the date aforesaid, the plaintiff was employed by and at [fol. 7] work for the defendant as a switchman in such interestate commerce and that on, to-wit, said date in the due course of his employment, he assisted in switching and moving many of said interstate cars; that it was then and there the duty of the defendant to exercise due care and caution for the safety of the plaintiff; that not regarding its duty in this behalf the defendant so negligently and carelessly moved and operated a certain engine with certain cabooses or cars attached thereto on, over and along one of said tracks in said yard that said cabooses or cars and said engine struck and collided with the plaintiff as he, in the due course of his said employment, was in the

act of crossing said track there and the plaintiff was then and thereby so injured that one of his legs was thereafter necessarily amputated; divers bones of his body were dislocated and broken; divers muscles, ligaments, membrances, nerves, blood vessels and tissues of his body were sprained, torn, cut bruised and injured; divers organs of his body were displaced, bruised, torn and injured and their functions impaired; his brain and nervous system were greatly chocked and injured and their functions impaired; and by reason thereof he became sick, sore, lame and disordered, and has so remained from thence hitherto; and he has suffered great pain and anguish by reason of said injuries, and in the future will continue to suffer therefrom; and has, by reason of said injuries, expended and necessarily incurred great liability and indebtedness in endeavoring to be cured of his said injuries; and he has also been unable to work, and will in the future be unable to pursue his usual occupation, and he has, by reason thereof, lost a large amount in wages and earnings, and in the future will continue, by reason thereof, to lose his earnings and wages.

[fol. 8] Second Count

For that whereas on, to-wit, Decemer 31st, 1924 the defendant was a common carrier by railroad engaging in interstate commerce in and between the State of Illinois and various other states of the United States; that as such common carrier defendant was in possession, control of and using certain railroad tracks at or near the place known as Kolze, Illinois, said tracks constituting what is known as a yard; that in said yard the defendant on, to-wit, the date aforesaid moved and switched certain cars, some of which contained interstate freight and merchandise and all of which were so moved by defendant in interstate commerce on, over and along said tracks there; that on, to-wit, the date aforesaid, the plaintiff was employed by and at work for the defendant as a switchman in such interstate commerce and that on, to-wit, said date in the due course of his employment, he assisted in switching and moving many of said interstate cars; that it was then and there the duty of the defendant to exercise due care and caution for the safety of the plaintiff; that not regarding its

duty in this behalf the defendant negligently and carelessly ran, managed, operated and controlled a certain locomotive engine on, over and along one of said tracks in said yard without dimming, or lessening the rays from the headlight on said locomotive engine; that it was then and there night time and that said locomotive engine was operated, managed and controlled as aforesaid within the yard limits where plaintiff and other servants of defendant were engaged in moving and switching cars as aforesaid; that defendant knew or in the exercise of ordinary care ought to have known that plaintiff and said other servants were at work in and about said yard and that the powerful headlight on said locomotive engine was of such intensity as to blind and dazzle the vision of plaintiff and others in and about said yard there and that the headlight on said engine [fol. 9] could easily and readily have been dimmed; that by reason of defendant's said negligence and carelessness the plaintiff, as he crossed said track on which said locomotive engine was being operated as aforesaid and as he stepped upon another track immediately next and close to said track on which said engine was being operated as aforesaid was blinded by the dazzling light from said headlight on said locomotive engine so that he could not and did not see a certain other engine with caboose cars attached thereto approaching on said other track next to said track on which said locomotive engine was as aforesaid; that by reason of defendant's said negligence and carelessness said caboose cars struck plaintiff as he, in the due course of his employment was in the act of crossing said tracks as aforesaid, and ran upon, against and over him and so injured him that one of his legs was thereafter necessarily amputated; divers bones of his body were dislocated and broken; divers muscles, ligaments, membranes, nerves, blood vessels and tissues of his body were sprained, torn, cut, bruised and injured; divers organs of his body were displaced, bruised, torn and injured and their functions impaired; his brain and nervous system were greatly shocked and injured and their functions impaired; and by reason thereof he became sick, sore, lame and disordered, and has so remained from thence hitherto; and he has suffered great pain and anguish by reason of said injuries, and in the future will continue to suffer therefrom; and has, by reason of said injuries, ex-

pended and necessarily incurred great liability and indebtedness in endeavoring to be cured of his *siad* injuries; and he has also been unable to work, and will in the future be unable to pursue his usual occupation, and he has, by reason thereof, lost a large amount in wages and earnings, and in the future will continue, by reason thereof, to lose his earnings and wages.

[fol. 10] Third Count

For that whereas on, to-wit, December 31st, 1924 the defendant was a common carrier by railroad engaging in interstate commerce in and between the State of Illinois and various other states of the United States; that as such common carrier defendant was in possession, control of and using certain railroad tracks at or near the place known as Kolze, Illinois, said tracks constituting what is known as a yard; that in said yard the defendant on, to-wit, the date aforesaid moved and switched certain cars, some of which contained interstate freight and merchandise and all of which were so moved by defendant in interstate commerce on, over and along said tracks there; that on, to-wit the date aforesaid, the plaintiff was employed by and at work for the defendant as a switchman in such interstate commerce and that on, to wit, said date in the due course of his employment, he assisted in switching and moving many of said interstate cars; that it was then and there the duty of the defendant to exercise due care and caution for the safety of the plaintiff; that not regarding its duty in this behalf the defendant negligently and carelessly moved and operated a certain engine with certain cabooses or cars attached thereto, on, over and along one of said tracks in said yard without keeping any lookout or any proper and sufficient lookout so as to have discovered the plaintiff as he, in the due course of his said employment, was in the act of crossing said track there, although defendant knew, or in the exercise of ordinary care ought to have known that the plaintiff and other workmen were or might be at said point in said yard; that by reason of defendant's said negligence and carelessness said cabooses so operated struck and ran upon, against and over the plaintiff and he was then and thereby so injured that one of his legs was thereafter necessarily amputated; divers bones of his body were dislocated

and broken; divers muscles, ligaments, membranes, nerves, [fol. 11] blood vessels and tissues of his body were sprained, torn, cut, bruised and injured; divers organs of his body were displaced, bruised, torn and injured and their functions impaired, his brain and nervous system were greatly shocked and injured and their functions impaired; and by reason thereof he became sick, sore, lame and disordered, and has so remained from thence hitherto; and he has suffered great pain and anguish by reason of said injuries, and in the future will continue to suffer therefrom; and has, by reason of said injuries, expended and necessarily incurred great liability and indebtedness in endeavoring to be cured of his said injuries; and he has also been unable to work, and will in the future be unable to pursue his usual occupation, and he has, by reason thereof, lost a large amount in wages and earnings, and in the future will continue, by reason thereof, to lose his earnings and wages.

Fourth Count

For that whereas on, to-wit, December 31st, 1924 the defendant was a common carrier by railroad engaging in interstate commerce in and between the State of Illinois and various other states of the United States; that as such common carrier defendant was in possession, control of and using certain railroad tracks at or near the place known as Kolze, Illinois, said tracks constituting what is known as a yard; that in said yard the defendant on, to-wit, the date aforesaid, moved and switched certain cars, some of which contained interstate freight and merchandise and all of which were so moved by defendant in interstate commerce on, over and along said tracks there; that on, to-wit, the date contained interstate freight and merchandise and all of the defendant as switchman in such interstate commerce and that on, to-wit, said date, in the due course of his employment, he assisted in switching and moving many of said interstate cars; that at and for a long time prior to the date aforesaid it was and had been the custom and general practice of the defendant, through its servants in charge of [fol. 12] locomotive engines operated in and about said yard in the night time, to dim or shut off the intense and blinding rays of light from the headlights of all engines so operated and used in and about said yard whenever said

engines were used and moved within the limits of said yard; that plaintiff at all times relied upon said general custom and practice of the defendants in said respect; that on, to-wit, the date aforesaid, it was the duty of the defendant to exercise due care and caution for the safety of the plaintiff; that not regarding its duty in this behalf. the defendant negligently and carelessly, through certain of its servants and employees ran, managed, operated and controlled a certain locomotive engine on, over and along one of said tracks in said yard and within the limits of said yard without dimming or shutting off or reducing the intense and blinding rays of light from the headlight on said locomotive engine contrary to and in violation of the aforesaid general custom and practice of the defendant; that by reason of said defendant's said negligence and carelessness the plaintiff as he, in the due course of his said employment, was in the act of crossing a certain track near to and next adjacent to said track on which said locomotive engine was, was so blinded and his vision so dazzled by the intense rays of light from said locomotive engine as it approached him that he could not and did not see certain cabooses or cars attached to a certain other engine approaching upon and along said other track there; that by reason of defendant's said negligence and carelessness, said caboose cars struck, ran upon and against the plaintiff and he was then and thereby so injured that one of his legs was thereafter necessarily amputated, divers bones of his body were dislocated and broken, divers muscles, ligaments, membranes, nerves, blood vessels and tissues of his body were sprained, torn, cut, bruised and injured; divers organs of his body were displaced, bruised, torn and injured and their functions im-[fol. 13] paired; his brain and nervous system were greatly shocked and injured and their functions impaired; and by reason thereof he became sick, sore, lame and disordered, and has so remained from thence hitherto; and he has suffered great pain and anguish by reason of said injuries, and in the future will continue to suffer therefrom; and has, by reason of said injuries, expended and necessarily incurred great liability and indebtedness in endeavoring to be cured of his said injuries; and he has also been unable to work, and will in the future be unable to pursue his usual occupation, and he has, by reason thereof, lost a large amount in

wages and earnings, and in the future will continue, by reason thereof, to lose his earnings and wages.

To the damage of the plaintiff in the sum of Thirty-Five Thousand Dollars ($35,000.00) and therefore he brings this suit.

H. H. Patterson, Attorney for Plaintiff.

Appearance for defendant omitted in printing.

[fol. 14] In Circuit Court of Cook County

[Title omitted]

Plea—Filed April 21, 1925

Now comes the Defendant, Minneapolis, St. Paul & Sault Ste. Marie Railway Co., a corporation, by John L. McInerney, its attorney, and defends the wrong and injury, when, etc., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, in manner and form as the Plaintiff has in the above Declaration and each count thereof, compained against it, this Defendant, and of this the said Defendant puts itself upon the Country.

And for a further Plea in this behalf, the Defendant, Minneapolis, St. Paul and Sault Ste. Marie Railway Co., says that the Plaintiff ought not to have or maintain his [fol. 15] aforesaid action against this Defendant, because it says that, at the time of the committing of the said supposed grievances set forth in the Declaration and each county thereof, the Plaintiff was not employed and at work for the Defendant as a switchman in interstate commerce and at the said time aforesaid was not in the due course of his said employment.

Wherefore the Defendant prays judgment whether the Plaintiff ought to have or maintain his aforesaid action against said Defendant.

John L. McInerney, Attorney for Defendant.

In Circuit Court of Cook County

[Title omitted]

Stipulation re Additional Plea and Order Thereon—Filed Nov. 15, 1926

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that leave be given the Defendant, Minneapolis, St. Paul & Sault [fol. 16] St. Marie Railway Company, a corporation, to file instanter an Additional Plea to the Plea heretofore filed herein on behalf of said Defendant to the Declaration of the Plaintiff, and that the Plaintiff plead or demur to said Additional Plea within ten (10) days.

H. H. Patterson, Attorney for Plaintiff. John L. McInerney, Attorney for Defendant.

[Title omitted]

On the stipulation of the parties to this suit filed it is ordered that leave be and is hereby given the defendant to file instanter its additional plea herein.

It is further ordered that the plaintiff reply to said additional plea within ten days from this date.

[fol. 17] In Circuit Court of Cook County

[Title omitted]

Additional Plea—Filed Nov. 15, 1926

And for a further plea in this behalf, the Defendant, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, by John L. McInerney, its attorney, says that the Plaintiff ought not to have or maintain its aforesaid action against this Defendant, because it says that at the time of the committing of the said supposed grievances set forth in the Declaration and each count thereof, or at any other time, the Plaintiff was not employed by the Defendant.

Wherefore the Defendant prays judgment whether the Plaintiff ought to maintain his aforesaid action against said Defendant.

John L. McInerney, Attorney for Defendant.

[fol. 18] In Circuit Court of Cook County

[Title omitted]

Replication—Filed Dec. 16, 1926

Now comes the plaintiff, by H. H. Patterson, his attorney, and as to the plea filed by defendant herein on November 8th, 1926, and says that at the time and place set forth in plaintiff's declaration when plaintiff was injured, as therein set forth, that plaintiff at said time and place was employed by defendant as in said declaration alleged, and that plaintiff ought not be barred of his action by anything in said plea set forth; that as to all of such matters plaintiff puts himself upon the country.

H. H. Patterson, Attorney for Plaintiff.

[fol. 19] In Circuit Court of Cook County

[Title omitted]

Minute Entries—Dec. 16, 1926

This cause being called for trial come the parties to the suit by their attorneys respectively and issues being joined it is ordered that a jury come whereupon come the jurors of a jury of good and lawful men, towit, Wm. A. Bodine, Jas. H. Devine, Jno. Lenihan, Stuert D. Lyon, Wm. Wilson, Arthur A. Knowles, Herbert R. Ledge, E. Kenneth McLay, Otto Beck, Joe Holasz, Benj. E. Reynolds, Harold Knipschild, who, being duly elected, tried, and sworn will and truly to try the issues joined herein, and a true verdict render according to the evidence and thereupon on motion of plaintiff's attorney it is ordered that leave be and is hereby given the plaintiff to file his replication to the de-

fendant's additional pleas herein instanter and the hour for adjournment having arrived it is ordered that said jury be permitted to separate until 10 o'clock tomorrow morning.

Compared.

[fol. 20] [Title omitted]

December 17, 1926.

This day again come the parties to this suit by their attorneys respectively and the jury heretofore impaneled herein for the trial of said cause also come and the hour for adjournment having arrived it is ordered that said jury be permitted to separate until Monday morning December 20, A. D. 1926 at 10 o'clock A. M.

Compared.

December 20, 1926.

This day again come the parties to this suit by their attorneys respectively and the jury heretofore impaneled herein for the trial of said cause also come and the hour for adjournment having arrived it is ordered that said jury be permitted to separate until 10 o'clock tomorrow morning.

Compared.

[fol. 21] Dec. 21, 1926.

And afterwards, to-wit, on the 21st day of December A. D. 1926, a certain Verdict was filed in the office of the Clerk of said Court, in words and figures following, to-wit:

We the jury find the Defendant guilty and assess Plaintiff's damages at the sum of Fifteen thousand dollars ($15,000.00).

Arthur A. Knowles, Foreman. J. H. Devine, Otto Beck, W. A. Bodine, John Lenihan, Benj. E. Renolds, Wm. Wilson, H. R. Lodge, Stuart D. Lyon, Joseph Haleasz, Kenneth McLay, Harold Knipschild.

December 21, 1926.

This day again come the parties to this suit by their attorneys respectively and the jury heretofore impaneled herein for the trial of said cause also come after hearing all the evidence adduced say:

[fol. 22] We the jury find the defendant guilty and assess the plaintiffs damages at the sum of fifteen thousand dollars ($15,000.00).

Whereupon the defendant enters herein its motion for a new trial in said cause which said motion is hereby entered and continued.

Compared.

December 23, 1926.

This cause coming on to be heard upon the defendant's motion heretofore entered herein for a new trial in said cause. After arguments of counsel and due deliberation by the court said motion is overruled and a new trial denied to which the defendant excepts.

Thereupon the defendant enters herein its motion in arrest of judgment which motion is also hereby overruled and denied to which the defendant excepts.

Therefore it is considered by the court that the plaintiff do have and recover of and from the defendant his said damages of fifteen thousand dollars ($15,000.00) in form as aforesaid by the jury assessed together with his costs and charges in this behalf expended and have execution therefor to which the defendant excepts.

Whereupon the defendant having entered its exceptions [fols. 23-26] herein prays an appeal from the above judgment of this court to the Appellate Court in and for the first district of the State *of the State* of Illinois which is allowed upon filing herein its appeal bond in the penal sum of eighteen thousand dollars ($18,000.00) to be approved by the clerk of this court within thirty days from this date and sixty days time from this date is hereby allowed the defendant in which to file its bill of exceptions herein.

Compared.

Bond on appeal for $18,000.00, approved and filed Jan. 6, 1927, omitted in printing.

[fol. 27] In Circuit Court of Cook County

[Title omitted]

Stipulation re Bill of Exceptions—Filed Jan. 7, 1927

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys of record that the original Bill of Exceptions in said cause in lieu of a copy thereof may be incorporated in the Transcript of Record for use on appeal to or Writ of Error from the Appellate and Supreme Courts of the State of Illinois.

H. H. Patterson, Attorney for Plaintiff. John L. McInerney, Attorney for Defendant.

[fol. 28] In Circuit Court of Cook County

[Title omitted]

Notice of Motion for Approval of Bill of Exceptions—Filed Jan. 28, 1927

To H. H. Patterson, Esq., Attorney for Plaintiff, 1501 155 N. Clark St.

You will please take notice that on Friday, the 28th day of January, A. D. 1927, at the opening of Court in the forenoon, or as soon thereafter as counsel can be heard, I shall appear before His Honor Judge Brewer, in the room usually occupied by him as a courtroom in the County Building, and move the Court to approve the Bill of Exceptions which I shall present in open Court. At which time and place you may appear if you see fit.

John L. McInerney, Attorney for Defendant.

Received a copy of the above notice this 27th day of January, A. D., 1927. H. H. Patterson, Attorney for Plaintiff.

[fols.29 & 30] In Circuit Court of Cook County

[Title omitted]

Order Approving Bill of Exceptions—Jan. 28, 1927

This day comes the defendant by its attorney and presents to the court its bill of exceptions herein for approval and said Bill of Exceptions is duly approved signed sealed and ordered filed.

Compared.

[File endorsement omitted.]

[fol. 31] In Circuit Court of Cook County

John Rock

vs.

Minneapolis, St. Paul & Sault Ste. Marie Ry.

Bill of Exceptions—Filed Jan. 28, 1927

Caption

Be it remembered that heretofore, on, to wit: Thursday, December 16, 1926, at the hour of 2 o'clock P. M. this cause came on for trial before the Honorable Walter Brewer, Judge of the Fifth Judicial Circuit of the State of Illinois, sitting as one of the Judges of said Court, and a Jury upon the Bill and Answer heretofore filed herein; whereupon the folowing proceedings were had and evidence heard.

Appearances of Counsel

H. H. Patterson for the Plaintiff.
John L. McInerney for the Defendant.

And thereupon the Plaintiff, to maintain the issues in his behalf, introduced the following evidence, to wit:

John J. Rock, the Plaintiff herein, called as a witness on his own behalf, being first duly sworn, was examined and testified as follows:

[fol. 32] Direct examination.

By Mr. Patterson:

Q. What is your name?
A. John J. Rock.
Q. Where do you live?
A. 2142 North Maplewood.
Q. How old a man are you?
A. Thirty-three.
Q. And where were you born?
A. Slayton, Minnesota.
Q. And how far in school did you go?
A. About 7th grade.
Q. After you left school, what work did you first do?
A. Worked on a farm.
Q. And for how long?
A. Oh,—quite a few years; I don't know just how many years.
Q. And aside from that work, what is the next work which you did?
A. I went to work on a section.
Q. For what railroad?
A. The Great Northern.
Q. Where?
A. At Slayton, Minnesota.
Q. How long did you work for the Great Northern?
A. Oh, two or three years.
Q. All the time?
A. All the time.
Q. Then what did you do after leaving the Great Northern?
A. I go to North Dakota on the farm.
Q. And after working there on a farm, what, if any, other work did you do?
A. Oh, I went in this beanery for Leslie.
Q. What do you mean, "Beanery"?
A. Well, the restaurant.
Q. Where?
A. Well, I started in at Minneapolis.
Q. Who did you work for?
A. Leslie Co.
Q. Who are they?

A. That is,—they have these restaurants all along the Soo Line.

Q. What is your first name?

A. Joe.

Q. And under what name did you work for Leslie?

A. Joe Rock.

Q. And about how long did you work for Leslie in these [fol. 33] restaurants along the Soo Line?

A. Oh, about a year. Not quite.

Q. Do you remember about when that was, as near as you can tell?

A. Well, we came to Kolze '23, in March some time; I don't know just what date.

Q. What was the last work you did before you came out here to Kolze Yard of the Soo?

A. I worked on the farm.

Q. Then when you came there, what was your first connection with the Soo Line?

A. Well, I worked in this restaurant.

Q. Where?

A. Kolze.

Q. Is that run by the Soo Line?

A. Well, he has got a contract with the Soo Line.

Q. You don't know much about that?

A. I don't know much,—nothing about that part of it.

Q. There is a restaurant out there?

A. Yes.

Q. How long did you work there?

A. Oh, not quite a year.

Q. When did you apply for work as a switchman for the Soo Line?

A. The 1st of October, 1923.

Q. And under what name?

A. Joe Rock.

Q. That was your correct name?

A. Yes, sir.

Q. Have you a brother, John Rock?

A. Yes, sir.

Q. Where is he?

A. He is in North Dakota.

Q. What does he do?

A. He is working on a farm out there.

[fol. 34] Q. When you made application for work on the Soo Line for the first time as Joe Rock, were you accepted or rejected?

A. I was rejected.

Q. What was the matter with you, if you know?

A. Well, I had a few operations and then I had a rupture.

Q. Where? What operations do you mean?

A. Well, I had an operation 1912 for an abscess in my stomach; then in 1927—or 1917, appendix taken away from me.

Q. And after those operations, what was your physical condition as to whether or not you worked and did your usual work?

A. Oh, after these operations I worked on a farm; then I went to work here.

Mr. McInerney: Pardon me, did I hear you say the word "rupture," too?

The Witness: Yes.

Mr. Patterson:

Q. Then after this rejection of employment, what did you next do?

A. I was—I didn't do nothing until the 18th of October.

Q. Did you make another application?

A. Yes, sir.

Q. In what name?

A. John Rock.

Q. Was that in your handwriting?

A. No; the yard master gave me a letter to do down at that time.

Q. The yard master; where did you go when you applied for the job, first?

A. I go to the yard master.

Q. Where?

A. Right in the depot, at Kolze.

Q. What is his name?

A. John O'Hara.

Q. Did you present yourself there in person the first time?

A. Yes, sir.

[fol. 35] Q. Did you go there the second time?

A. Yes, sir.

Q. And after this first examination, do you know whether or not the report of the examination had come back to the yard master?

A. I didn't know nothing about that.

Q. How long from the time of the first to the second examination?

A. I went down about the 1st of October, the first one, and about the 18th, the second one.

Q. And after applying this second time to the same man, then were you examined again yourself?

A. No, sir.

Q. Some one else was?

A. Another fellow went down for me.

Q. Did you go to work then?

A. I went right to work. I made student trips, three student trips; then I went to work.

Q. When you made this application, did you give your own references, people that you knew?

A. When I made this application I got someone; this fellow got examined by the doctor and I went right over and made out the references.

Q. Your own references?

A. My own; yes, sir.

Q. How long before you knew whether or not the employment had been given, or assured?

Mr. McInerney: I object to that.

The Court: Strike it out.

[fol. 36] Mr. Patterson:

Q. Was there any period of time from the time you applied until you knew definitely you were to remain as a switchman there?

A. It was from thirty to sixty days.

Q. Did you work there during that thirty to sixty days?

A. Yes, sir.

Q. How long did you work as a switchman from the time you went to work until the time of this accident?

A. About—around fourteen months.

Q. What was your job as a switchman?

A. Well, I was just a helper, they call it out there.

Q. Well, what do you mean by that?

A. Throwed switches, for when they kick cars down, or when they switch cars, or pull pins—whichever the oldest men, the seniority, had the right.

Q. Did you do regular switchman's work?

A. Yes, sir.

Q. Irving Park Boulevard runs east and west, doesn't it?

A. Yes, sir.

Q. The yards that were then known as the Kolze Yards were north of Irving Park Boulevard, were they?

A. Yes, sir.

Q. And about how many tracks are there on Irving Park?

A. There are seven.

Q. And then as you go north of Irving Park—You are facing north there, as you go north of Irving Park, what was the most westerly track known as?

A. What was that?

Q. The most westerly track, what is that? What do you call that?

A. As I go north?

A. Yes.

A. The switching lead.

[fol. 37] Q. I don't mean that——

Mr. McInerney: That is all right.

Mr. Patterson:

Q. The ice house track.

A. The ice house track.

Q. And just west of the ice house track, were there any buildings there at that time?

A. Yes, there was an oil shanty, car knocker's shanty, and where they keep their tools; the ice house and the freight house, and the restaurant.

Q. And on which side of the street or Irving Park Boulevard was the restaurant?

A. North side.

Q. Where did you live at that time?

A. Lived in the south side, upstairs with my mother-in-law.

Q. Where?

A. Parker's.

Q. I know—on Irving Park Boulevard?

A. South of there; it is south of Irving Park.

Q. Of Irving Park Boulevard?

A. Yes, sir.

Q. On the south side there?

A. There is a street that runs right out in the road, almost.

Q. Where is it with reference to this restaurant, railroad restaurant?

A. The restaurant is right across from that—from the——

Q. Now, you come first to the ice house track as you cross from the oil shanty?

A. Yes.

Q. I am talking about north of Irving, about where this accident happened; then, what is the next track you come to?

A. The new lead.

Q. The new yard lead?

A. The new yard lead.

Q. Then, the next track?

A. The old yard lead.

Q. What do you mean by lead tracks?

A. It is where their tracks branch off of there a number of certain tracks on which to switch cars.

[fol. 38] Q. These lead tracks are used for what purpose?

A. Well, switching cars—making up——

Q. And how far north of Irving Park Boulevard would you go until you come to these switch tracks that led off from the lead?

A. There is one about five feet from Irving Park. Those are about—around 200 or 300 feet.

Q. Are there many or few switch tracks up there leading off that lead track?

A. Yes, there are either thirteen or fourteen of them.

Q. What day did this accident happen on?

A. The 31st of December, 1924.

Q. What time did you go to work that day?

A. Three o'clock.

Q. How many men in your crew?

A. Five.

A. Engineer and fireman and other switchmen and conductor, is that right?

A. Yes, sir.

Q. What was your conductor's name, if you remember?

A. Vic Hoffmeister.

Q. How many hours of employment did you have? Eight?

A. Eight hours.

Q. You went to work, you say, at three in the afternoon?

A. Yes, sir.

Q. What time did you lay off for lunch, if you did lay off?

A. We came in around eight-thirty or nine o'clock.

Q. And by "we," whom do you mean?

A. Well, the crew.

[fol. 39] Q. And yourself?

A. And myself.

Q. What had you been doing during the time from three up until eight or nine o'clock?

A. Well, we were at the north end of the yard, switching cars and making up trains.

(Discussion.)

Mr. Patterson: It is agreed here, I believe, to save a little time, but this man, the work that he did there that night, was interstate work in switching, making up trains and breaking up trains.

Mr. McInerney: That is right.

The Court: Let your record so show.

Mr. Patterson:

Q. When you came in there from your half day's work, eight-thirty or nine, where did you leave your engine?

A. Right east of the depot.

Q. Where was that depot?

A. That was two or three hundred feet north of Irving Park Boulevard.

Q. And on which side of the main line tracks?

A. It was east of the main line tracks.

Q. Then the main line tracks of these two leads from the ice house lead would be west of that depot, would they?

A. West of the depot.

Q. And then there were a couple of more tracks east of the depot?

A. Then there were a couple of more tracks east of the depot.

Q. Where did you leave your engine?

[fol. 40] A. Away out on—well, they call it the spurs; shove coal away out to a fellow, a coal shute, right east of the depot.

Q. That would be east of the depot?

A. That would be east of the depot.

Q. What did you stop for?

A. For supper.

Q. How long a time did you have?

A. Twenty minutes.

Q .Do you know where your crew went?

A. Some of them went in the depot,—that is, the switchmen,—the switchmen, but the engineer and fireman, I don't know where they went; they generally eat in the engine; they had their lunch with them.

Q. They what?

A. They had their lunch with them.

A. Where did you go?

A. I went over to my mother in law's for supper.

Q. That would be across all of the tracks?

A. Across all of the tracks.

Q. Over west on the south side of Irving?

A. Yes, sir.

Q. About how far from the tracks?

A. They are about three hundred feet.

Q. Did you eat there that night?

A. Yes, sir.

Q. About how long were you there?

A. Oh, about between then and fifteen minutes.

Q. And then where did you go?

A. I went over to the oil station.

Q. What oil station?

A. Well, I went—I was going back to work when I stopped at the oil station to fill my lantern.

[fol. 41] Q. By oil station what do you mean?

A. Well, oil house.

Q. Whose oil house?

A. Belongs to the Soo Line.

Q. And that you have already testified to was on the west side of the tracks?

A. Yes; west side of the tracks.

Q. Did you fill your lamp or lantern there?

A. Yes, sir.

Q. Was there any one with you?

A. No, sir.

Q. About how far north of Irving was this oil house or oil car where you got your oil?

A. About 150 feet or 200 feet.

Q. Then, after filling your lantern, did you light it?

A. Yes, sir.

Q. Where did you go?

A. I went,—I was going to my engine.

Q. What for?

A. To go to work.

Q. To do what kind of work?

A. Same as we did before supper.

Q. And what was the first track that you crossed after you left the oil house, the oil station?

A. The ice house track.

Q. About how far from that ice house track over to the next track you came to?

A. About forty or fifty feet.

Q. As you were crossing that space there, what, if anything, did you see on the next track?

A. A bright headlight.

Mr. McInerney: What?

(Answer read.)

Mr. Patterson:

Q. What was it?

A. A locomotive,—or train.

[fol. 42] Q. Where was it?

A. About fifty feet, west of Irving Park Boulevard.

Q. West?

A. Or, south, of Irving Park Boulevard.

Q. On which track was it coming?

A. Coming down this new lead.

Q. About how fast, if you know, was it moving?

A. On, about three miles an hour, I should judge; somewhere in there.

Q. And what did you do?

A. I kept right on walking.

Q. Did you cross the track on which this train was coming?

A. Yes, isr.

Q. Now, at the time you got on that track, or crossed it, how far from you was it down to where the engine was coming?

A. Oh, about 50 or 75 feet, or 100; something like that.

Q. After you crossed that track, how much space from that track to the next one?

A. About fifteen feet.

Q. And what did you do after going across that track?

A. I kept right on walking.

Q. Did you look?

Mr. McInerney: Wait a moment, now. I think you ought to let him testify part of the time.

The Court: Let him tell what he did.

Mr. McInerney: I move that that be stricken.

The Court: It is stricken.

Mr. Patterson: I didn't hear it.

Q. What did you do after you crossed that track and went on east?

A. I kept right on walking and I looked both ways; couldn't see nothing south, or north; so I looked south and all I seen was the bright headlights.

—. What effect did that headlight have on your vision as you looked south?

[fol. 43] A. It blinded me. I couldn't see.

Q. Then what happened?

A. Well, I kept right on going.

Q. Then what happeend?

A. And the next thing I knew, why, I seen a caboose.

Q. Where did the caboose come from?

A. The caboose was coming down the old lead.

Q. Well, go ahead; that don't mean anything. Where did it come from?

A. Come out from under that bright headlight.

Q. Which way was it moving?

A. North.

Q. Which was was the train moving?

A. North.

Q. How far away from you was the caboose when it came out from under the light where you saw it?

A. About 10 feet, I should judge; something like that.

Q. What did you do?

A. I tried to get out of its way.

Q. What happened?

A. It struck me and knocked me down.

A. How was it coming, as to whether it was coming fast or slow?

A. Fast.

Q. Did you hear any signal or bell or warning from the caboose?

A. No, sir.

Q. Was there any one on it?

A. No, sir.

A. Or any light on it?

A. No.

Q. And when it struck you and knocked you down, what happened then?

A. Well, it rolled me right up underneath there; it dragged me about 30 or 40 feet, I think: 45 feet.

Q. Did it stop?

A. Yes, it stopped.

Q. When it stopped, where were you?

[fol. 44] A. Between the two cabooses, astraddle of the rail.

Q. How many cabooses or engines, tell us what was there.

A. There were two cabooses and an engine.

Q. Which way was the engine headed?

A. North.

Q. Were the cabooses to the front of the engine?

A. In front of the engine.

Q. What do you railroad men refer to that as,—shoving?

A. Yes; shoving.

Q. What part of the caboose hit you?

A. The North end of the caboose.

Q. And after it was all over, on which side of it, as you lay north, were you, the right or the left?

A. In the right.

Q. That would be the east rail?

A. East rail.

Q. And were you conscious or unconscious?

A. I was conscious.

Q. How long before any one got to you?

A. Oh, about a minute, I guess, or so.

Q. What did you do?

A. They took and put me on a stretcher.

Q. What did you do?

A. I tried to crawl out myself, and I got part way out and a fellow helped me through.

Q. What did you find out about yourself?

A. I found out when I went to lift the leg over the rail, why, I couldn't handle it; so I took both hands, one down by my shoe and one down here and put it over the rail; and then some one took hold of my arm.

Q. Who was that?

A. When they spoke it was Hudson, a fellow by the name of Hudson; he was conductor on the train.

Q. What happened to this other train with the bright headlight?

[fol. 45] A. They stopped.

Q. After it was all over and you were there, where was the engine on that train?

A. They were about even.

Q. Even with what?

A. Even with the caboose.

A. And then what was done with you?

A. They put me on a stretcher and in 15 or 20 minutes, I would say, they put me in one of the cabooses but I couldn't say which one.

Q. Where did they take you?

A. Forest Park.

Q. Then where?

A. They put me in an ambulance and took me to Oak Park Hospital.

Q. What was done with you there?

A. After about half an hour after I was there, I guess, they amputated my leg.

Q. You were given an anesthetic?

A. Yes.

Q. When you woke up, what did you find? The leg had been amputated?

A. The leg was amputated.

Q. Where?

A. Eight inches below the knee.

Q. That is, which leg?

A. The left leg.

Q. Were you hurt anywhere besides that?

A. I had—my right knee, had a gash in it, about 4 inches.

Q. Anywhere else?

A. I had about six stitches in my head.

Q. Did those injuries on your right knee and your head heal up promptly?

A. Yes, healed up fine.

Q. How long were you in the hospital?

A. Seven weeks and one day.

Q. How much of that time were you in bed?

A. About six weeks; five weeks and a half; somewhere in there.

Q. How frequently was the leg dressed?

A. Twice a day.

[fol. 46] Q. Tell us how you felt, as to whether or not you suffered pain during that time.

A. Yes. Next day, after they amputated by leg, I had pain up to—Well, you might say, until I got out of bed. It wasn't practically healed, but——

Q. When you got out of the hospital, then you went to your home, did you?

A. I went to my home.

Q. Was the leg treated after that?

A. I went back there every day after that for a couple of weeks and I went twice a week for a couple of weeks,—I don't know just how long.

Q. Where did you go?

A. Oak Park Hospital.

Q. How long was it before the stump had entirely healed?

A. It was last Christmas, 1925.

Q. How long after the accident was it until you tried to use an artificial leg?

A. About the 1st of July, 1925.

Q. Did you use it all the time, then?

A. Once in a while it will bother me; it was so sore I had to take it off.

Q. Have you worn it most of the time since?

A. Most of the time since; yes, sir.

Q. You spoke of last Christmas, the Christmas of 1925; what, if anything,—what was the condition of the leg about that time?

A. Well, it wouldn't heal; it would heal pretty near up and break open again and I went to a doctor and he picked out a piece of bone,—until a few days ago and it broke open again. I don't know what is the matter; it feels to me there is another *pone* in there.

Q. About what did you earn as a switchman for the Soo Line at the time you worked there, about what per month?

A. About $140 or $150 a month; something like that.

[fol. 47] Q. Your rate was how much a day?

A. $6.16 a day.

Q. Did you work any overtime?

A. Quite a little overtime.

Q. Did you work every day or not?

A. Yes. Some days I didn't work for a week and some days,—some months, I would work every day, every day in the month.

Q. Why was that?

A. It was a slack time.

Q. When did you first go to work after the accident?

A. About the 15th of July, 1925.

Q. What kind of work did you get?

A. I got work in a machine shop, on a punch press.

Q. Where?

A. At 2550 Coyne avenue.

Q. How long did you work there?

A. I have been working there ever since.

Q. Have you worked there all the time?

A. Some days I laid off on account of slack time, and they would call me back.

Q. What kind of work is that?

A. That is making a lot of these wrenches, and——

Q. I mean, do you stand or sit?

A. No, I sit down and work.

Q. All the time?

A. Yes, sir; once in a while I get up.

Q. What, if any, trouble do you have with your leg now?

A. Why, only that being sore, you know, and if I do much walking it rubs with me a little, or something—I

don't know. There must be some loose bonds in there; I don't know what is the matter.

Q. Have you suffered any pain with it?

A. Sure. Every once in a while it pains me pretty bad, a change of weather or something.

Q. Now, Mr. Rock, tell the Court and Jury about where you started across those tracks, with reference to that oil house.

[fol. 48] A. That oil house is about 150 feet north of Irving Park Boulevard, and I started across there.

Q. With reference to the oil house on the west side there, where is the depot over on the side that you referred to?

A. It was on the east side of the ice house track.

Q. Well, I mean, was it straight across or——

A. Just a little angle; a good path crosses there.

Mr. McInerney: I move that the words, "good path across there," be stricken out.

The Court: They may be stricken out.

Mr. Patterson:

Q. What was the nature of the route you took in going across there that night?

A. What caused me to go across?

Q. No, what place did you walk across? What was there there when you went across?

A. Just cinders. Cinders was there.

Q. Has you ever cross there before?

A. Yes, hundreds of times.

Q. Had you seen other switchmen and railroad men cross there before?

A. Quite a few hundred of them crossed there while I was working there.

Q. Tell us whether or not there was any custom and general practice before this accident happened, when an engine was approaching and coming into the yard there, as to the use of the headlight on the engine?

A. The rules was to dim them.

Mr. McInerney: I move to strike out the answer.

The Court: Let it be stricken.

Mr. Patterson: Just answer the question yes or no.

Q. Was there a general custom and practice, before you were hurt, when engines and trains were coming into that yard, in regard to the use of the headlight—whether there was such a custom.

[fol. 49] Mr. McInerney: I object to that as calling for a conclusion.

The Court: Objection overruled.

Mr. McInerney: I suggest that the way to establish a custom is to show what actually occurred, not what he thinks is the custom. That is a question of law for the court to pass upon after the facts are ascertained.

The Court: Answer the question.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Q. (The pending question was read.)

A. Yes.

Mr. Patterson:

Q. What was that general practice and custom?

Mr. McInerney: I make the same objection to that.

The Court: Objection overruled.

To which ruling of the Court, the defendant, by its Counsel, then and there duly excepted.

A. To dim their headlights.

Mr. Patterson: And by dimming their headlights what do you mean?

A. To dim from bright so they won't blind you.

Q. Was that at all times a rule and custom in that yard while you were there?

Mr. McInerney: I object to that.

The Court: Objection sustained.

Mr. Patterson:

Q. Did you at any time before this night know of or see any engines coming into the yard with the bright lights on and remaining on?

A. Yes, sir.

Q. What?

A. No, sir.

Mr. McInerney: Which is it? Read the question.

(The pending question was read.)

[fol. 50] Mr. McInerney: I want him to say which he means.

Mr. Patterson: Counsel asked you which you mean.

A. No.

Q. With the bright headlights on the locomotive engines that were used there on this engine that night, with the bright light on and undimmed, about how far ahead of the engine would the rays light up the track?

A. They would go about 40 or 50 feet.

Q. How is that?

A. Down the track.

Q. How far ahead of the engine would the light brighten up if the bright ones were on?

A. Oh, five or six hundred feet.

Q. If the lights were dim, in fact, turned down, with the dim light on, was the light of sufficient intensity to blind one or dazzle one's vision?

A. No, it wouldn't.

Q. Was this direction you were following cars there, the way you took to go across that track, the usual and customary route from the oil house to the depot over there?

Mr. McInerney: I object to that.

The Court: Objection sustained.

Mr. Patterson:

Q. Do you know about how long a train that was that was coming in with this engine, with the bright headlight? If you know; if you don't, say so.

A. No, I don't. Around eighty cars.

Q. Was it a long train? Could you see that?

A. It was a long train.

Q. Were there any lights, arc lights or other lights up in the yard, up near where this accident happened?

A. No, sir.

Q. Were there any down at Irving Park Boulevard, the street there?

A. A couple of little bulbs, one on each side, small bulbs.

[fol. 51] Q. That is the stree- light?

A. Yes, sir, the street light.

Mr. Patterson: That is all.

Mr. McInerney: I desire to have this plat marked "Defendant's Exhibit 1 for identification."

(Plat marked "Defendant's Exhibit 1 for Identification.")

Cross-examination.

By Mr. McInerney:

Q. When did you first go into the railroad business?

A. You mean for the Soo Line?

Q. No, for anybody?

A. Oh, gosh, I don't know the date I went into it.

Q. Well, what year?

A. I don't know that. It is quite a few years ago when I worked on the section.

Q. You worked on a section?

A. I worked on a section.

Q. For the Great Northern?

A. For the Great Northern.

Q. How many years did you work on the section?

A. Two or three years.

Q. That was all along the line of railroad repair work and things of that sort?

A. Yes, putting in ties, raising track—a regular section worker.

Q. Repairing bridges?

A. No, not repairing bridges; along the track.

Q. Did you work in yards, too?

A. No, there was only one side track where I worked.

Q. You have been in railroad yards?

A. Yes, sure.

Q. You have seen trains being made up and broken up dozens of times before you came to the Soo Line?

A. Not dozens of times—I can't say dozens of times.

Q. How many times?

A. Well, a few times. I couldn't enumerate them.

[fol. 52] Q. After you got through working as a section hand, what was your next job with the railroad?

A. This was my next one.

Q. This was your next job at railroading?

A. Yes.

Q. But you did work in the beaneries?

A. The only placed I worked in the beanery was at Kolze.

Q. While you worked at the beanery, were you in the yards?

A. Not in the yards. I would only go to the depot.

Q. Did you used to go to the depot then?

A. Yes, sir, when I got stuff for the beanery, for the restaurant.

Q. How would you go over there then?

A. Across the track in the same way that I was crossing it now.

Q. This same crossing?

A. Yes, sir, this same crossing.

Q. When did you go to work for the railroad?

A. In March, 1925.

Q. In 1925?

A. 1923.

Q. How many times did you cross it before October, 1923, before you were employed by the Soo Line at all, before you applied for employment by the Soo Line?

A. A number of times, I don't know how many.

Q. How many times a month?

A. That is getting down to too fine a point.

Q. As many as you can remember. I don't want to try to get it down to a fine point. As many as five or six times a month?

A. Maybe that; maybe a little more or a little less.

Q. Around in there somewhere?

A. Yes.

Q. You crossed at this point, over this new lead and the old lead?

A. Yes, sir.

Q. At different times of the day and night, I suppose? [fol. 53] Is that so?

A. Yes, sir.

Q. You were then familiar with the lay-out of the entire yard, what it was used for and how it was used, were you?

A. I couldn't really say I was, because I never paid no attention.

Q. You were generally familiar with the fact that it was a railroad yard?

A. It was a railroad yard.

Q. And these were lead tracks into switch tracks, for making and breaking up trains into the north?

A. Yes, sir.

Q. You knew that?

A. Yes, sir.

Q. You knew they were on the main lines?

A. I knew they were on the main lines.

Q. And since you went to work in October, 1923, up to the time you were injured, was your work confined to that yard?

A. Yes, sir.

Q. You never went out of that yard?

A. Yes, sir, I went to Canal Street. They have a yard there.

Q. You went sometimes to the freight terminal, down here?

A. Yes, sir.

Q. On what occasions did you go down there?

A. On the extra list. If they were short of a man they would send me down.

Q. How many times would you be out of the Kolze Yard from October, 1923, up to the time you were injured?

A. Maybe a month or over, because I took on a steady job at Canal Street about a month.

Q. Outside of that, for the rest of the time you were engaged at work in the Kolze Yard?

A. Yes, sir, while I was working——

Q. While you were working, except the time you didn't have any work?

A. Yes, sir.

Q. Every time you did work, you worked there?

[fol. 54] A. Yes, sir.

Q. As you said before, as an assistant?

A. Yes, sir.

Q. Pulling pins?

A. Yes, sir, and throwing switches; field man, they call it.

Q. Did you ever work on the movement where they were shoving cabooses——

A. Yes, sir.

Q. The same movement that was made that night when they ran into you?

A. Yes, sir.

Q. You had worked on that yourself?

A. Yes, sir.

Q. On the east side of the depot there is a caboose storage track?

A. Yes, sir.

Q. They got the cabooses, go over to Irving Park Boulevard and go into this track?

A. Yes, sir.

Q. They kick them in there to be used on the freights?

A. Yes, sir.

Q. And they do that, too, sometimes, every night?

A. Yes, sir.

Q. And that belt run—that is the belt run, where the headlight was on the engine?

A. Yes, sir.

Q. That is about the same time every night, isn't it?

A. Sometimes it is pretty late.

Q. But that is its time to be there?

A. Yes, sir, that is its time to be there.

Q. You knew it was due there, did you?

A. They didn't really have no time to be due in town.

Q. You knew that was the time they worked on cabooses, didn't you?

A. I seen the train there standing down, but I didn't know what train it was.

A. You knew that track next to the east bound new lead was used for backing in cabooses, didn't you, east of the [fol. 55] depot?

A. East of the depot?

Q. No, east of the new lead track on which the belt run was made.

A. Yes, sir.

Q. You knew that was what that track was used for?

A. Yes, sir.

Q. You knew they backed them up without lights, without anybody on the end, didn't you?

A. Well, I——

Q. Did you or did you not?

A. We had lights on once in a while when I worked on that——

Q. Did you have lights on when kicking them in?

A. Sometimes we would kick them in 20 minutes before loading time.

Q. On which end?

A. The north end.

Q. But they did operate without lights a great many times?

A. Once in a while.

Q. You knew that, too?

A. I wasn't supposed to.

Q. Did you know that on that next track, the one you ran into, there might be cabooses backed up without lights on them?

A. There might be, yes, sir.

Q. You had seen them before, had you?

A. Yes, sir.

Q. You had been working on that freight movement yourself, hadn't you?

A. Sure.

Q. We will refer to this engine which was heading in on the new lead, as the belt run. That is what it was, wasn't it?

A. Yes, sir, that is what it was.

Q. When you left the oil shanty, did you start to walk then due east over to the depot?

A. To go to my engine, not right due east to the depot, no.

Q. It was over in that direction?

A. Yes, sir, pretty near straight across.

Q. When did you first see the engine on the belt line?

[fol. 56] A. When I went in to fill my lantern.

Q. Where was it then?

A. South of Irving Park Boulevard.

Q. How far south?

A. Well, I couldn't really say—50, maybe 60 feet.

Q. Apparently moving?

A. Slow. Just——

Q. About three miles an hour?

A. Somewhere around there, yes.

Q. How far did it get before you crossed it? How many feet did it travel before you crossed it?

A. Well, maybe fifty feet; something like that; or forty feet.

Q. When did you start to walk?

A. After I got my lantern filled.

A. Where was the train then?

A. It was just about crossing Irving Park Boulevard when I got my lantern filled.

Q. And you started to walk when this engine was at the south line of Irving Park Boulevard?

A. Yes, sir.

Q. How far were you then from the track on which the engine was?

A. Well, when I got over there it was about 45 feet or 50 feet down—when the end crossed the crossing of Irving Park Boulevard I just about got to the track that it was coming down on.

Q. When the engine was on the north side of Irving Park Boulevard, you got to the track?

A. It was just about on it or on the north side of it a little bit.

Q. How far were you from that engine when you crossed in front of it?

A. Oh, about 40 feet, 50 feet or 75 feet, making a rough guess at it.

Q. You were 75 feet in front of that engine when you crossed in front of it?

A. Somewhere in there. It may have been a little more, just about at the crossing.

[fol. 57] Q. And you had your lantern in your hand?

A. Yes, sir.

Q. You walked all the time, did you?

A. Yes, sir.

Q. You didn't stop at all?

A. I just walked slow and I would look both ways when I got——

Q. You didn't stop, did you?

A. No.

Q. How far did you walk after you crossed the track before you were struck?

A. I walked about—about 25—about 20 or 25 feet or 20 feet, something like that.

Q. When you came to the engine on the belt line it was opposite the rear of the caboose, wasn't it?

A. Yes, sir.

Q. By which you were struck, is that right?

A. Yes, sir.

Q. Did you see those cabooses before you started away from the oil house?

A. No.

Q. Did you look up that way?

A. Not before I started from the oil house.

Q. You looked and saw the belt run engine.

A. Yes, sir.

Q. Didn't you see the cabooses at all?

A. No, sir.

Q. Didn't you see them parked with the engine in front, near Irving Park Boulevard, on the west side of the track?

A. No, sir.

Q. Did you see anybody with a lantern throwing switches?

A. No, sir.

Q. Did you see anybody from the time you left the oil station until you were struck?

A. Only the engine—that bright headlight.

Q. Did you see anybody standing on the front of the Belt engine?

A. No, I didn't notice anyone.

[fol. 58] Q. Did you see O'Connor that night?

A. No, sir.

Q. Did you see anybody throw a switch for the belt run?

A. No.

Q. Did you see Hudson at all that night?

A. No, sir, not until he spoke to me after the accident.

Q. How far on either side of the rails does this headlight throw its light?

A. Oh, around maybe 20 feet or 15 feet, something like that.

Q. Twenty feet or 15 feet on either side of the rail; something like that?

A. Well, maybe not quite that much.

Q. Well, approximately, as your best guess?

A. Maybe 10 or 15 feet or 20 feet, somewhere in there.

Q. When you were walking, facing the east and glancing once in a while, you had to cross in front of this engine, 75 feet in front of it, had you?

A. Somewhere around 75 feet.

Q. And facing east?

A. Yes, facing east.

Q. As you walked over there, 25 feet, it still blinded you when you looked at it, did it?

A. Sure.

Q. Did it?

A. Yes, sir.

Q. You were 25 feet over here, the engine is back here 50 feet; you are walking this way and looking down on the track, and it still blinded you, is that right? (Indicating.)

A. Yes, sir.

Q. You never jumped around and faced it, did you?

A. I didn't turn my whole body around.

Q. Did you at any time face a headlight with your face right towards its?

A. Yes, sir.

Q. When was that?

A. Oh, that is time and again.

Q. No, this night I am talking about. This night,

A. No, this night I didn't turn my body around to face it.

Q. I ask you if you faced it. I don't care anything about [fol. 59] your body.

A. Yes, sir.

Q. Where were you when you did that?

A. I was crossing, going over to the old lead.

Q. You had crossed in front of the belt engine?

A. Yes, sir, I had crossed.

Q. And you turned your face clear around and looked at that headlight?

A. I looked to see if there was anything going down the old lead.

Q. And then the headlight blinded you?

A. Yes, sir.

Q. Had you been blinded before by the glare of headlights in the yard?

A. Yes, sure.

Q. Then your eyes couldn't see? Was that it? When you got over to the track you couldn't see anything?

A. I wasn't really in the track.

Q. You couldn't see anything?

A. No, I couldn't see anything up to the old lead in the track?

Q. Whatever happened, you couldn't see anything coming up or down the old lead?

A. No.

Q. And you walked across without being able to see, is that right?

A. Yes, sir.

Q. Where were you when you first discovered that there was a caboose on the old lead?

A. Just stepping into—across the old lead.

Q. Just stepping into the track?

A. Yes, sir.

Q. You saw one, too, over the west rail, did you?

A. Yes, sir.

Q. You did? Were you still blinded?

A. Yes, sir.

Q. You were? Where was the belt run engine then?

A. Oh, about, maybe 50 feet from the crossing.

Q. From what crossing?

A. Fifty feet from the oil station, the ice house track I tried to cross.

[fol. 60] Q. Was that moving all the time?

A. Slowly.

Q. The same speed you were going?

A. I could go faster than that.

Q. You were going faster than the engine?

A. Yes, sir.

Q. How much faster?

A. I couldn't say how much faster.

Q. Were you in a hurry to get back to your job?

A. Yes, sir.

Q. What was your hurry?

A. I was afraid I would be late.

Q. So you ran in front of this belt run engine?

Mr. Patterson: I object to that.

The Court: Objection sustained.

Mr. McInerney:

Q. You walked in front of it?

A. Yes, sir.

Q. Were you walking slow*ing*?

A. Not very slow.

Q. How fast would you walk?

A. I must have been going quite fast. I must have been walking faster than that Belt engine.

Q. Then you put your foot over the rail, on the old lead, and then, for the first time, saw that cabooses were backing into you? Is that right?

A. Yes, sir.

Q. How far south of you was the rear end of that caboose then?

A. About ten feet.

Q. What did you do then, keep on going?

A. I tried to get across.

Q. You only had one foot across the rail?

A. Yes. Then I was in the middle of the track—in the middle of the track, with one foot.

Q. After you stepped into the track with one foot, you were in the middle of the track?

A. Yes, sir.

Q. How far did you have to walk to get out of the way?

A. I had to walk——

Q. One more step?

A. One or two steps; something like that.

[fol. 61] Q. How fast was this caboose movement moved?

A. I don't know how fast. They were coming pretty fast.

Q. You saw them ten feet away from you?

A. Yes, sir.

Q. And then you proceeded to try to beat them? How do you judge the speed in ten feet?

A. Well, the way with such cars as they had there, they must have been going a pretty good gait.

Q. Do you know about how fast that run was going that night?

A. I couldn't say how fast they were going.

Q. They went about the same speed you did?

A. The cabooses?

Q. Yes.

A. Yes, sir, and then some.

Q. How many feet did you travel before you were hit?

A. I traveled about two feet.

Q. That was the first time that you could see, when you saw those cabooses?

A. Yes, sir.

Q. That is the first time you got out of this glaring headlight?

A. Yes, sir.

Q. That is what blinded you?

A. Yes, sir.

Q. And it was only because of that light that you couldn't see to the south?

A. I couldn't see the cabooses until they had come out from under that light.

Q. Because the cabooses were in your way?

A. Yes, sir.

Q. Do you know how far from the engine the glare of that headlight commences when it is up?

Mr. Patterson: What do you mean?

Mr. McInerney: Before it hit the top of a man's head.

A. It may be around 20 or 25 feet.

Q. If you are inside of that it does not bother you?

A. It doesn't blind you much—very bad.

Q. Does it blind you?

A. I wouldn't say it blinds you, no.

[fol. 62] Q. If you are within 25 feet of the engine, a glaring headlight doesn't bother you, does it?

A. No, it is not really over your head.

Q. It does not really blind you does it?

A. Maybe it don't make him blind, but you know how it is if a fellow throws a light on you.

Q. Is it as bad as it was at 75 feet?

A. No, no.

Q. It gets worse as it goes out farther?

A. Yes, sir.

Q. After that, if it gets out to 150 feet, it blinds you altogether, doesn't it?

A. Yes, sometimes.

Q. You mean the type that was on that engine?

A. Yes, sir.

Q. You had no work to do on either of these trains, either the belt run or the kick-in, did you?

A. No, sir.

Q. You know how fast they usually kicked?

A. Yes, sir.

Q. Was there anything extraordinary about the movement of the cabooses that night that occurred to you?

A. I couldn't say that.

Q. By whom were you examined when you made your first application?

A. By George Thompson.

Q. Where was that?

A. Out on Madison Street.

Q. By George Thompson personally?

A. Him and his partner was there. Both of them was there—Both worked around there, asking questions.

Q. McMullen and Thompson?

A. Yes, sir.

Q. On that day, October 1, 1923, you went down and got a card from Simpson?

A. Yes, sir.

Q. A slip?

A. Yes, sir.

Q. And you took this out to the doctor?

A. Yes, sir.

Q. And they put you through the "sprouts," and that day you told them all of the truth about yourself, did you? [fol. 63] A. Yes, sir.

Q. Is that so?

A. Yes, sir.

Q. That you had had appendicitis and stomach ulcers and a hernia?

A. Yes, sir.

Q. And you told them all about yourself, is that so?

A. Yes, sir.

Q. And you found, then, that they rejected you because you were not competent to take the job as switchman?

A. Yes, sir.

Q. Is that so?

A. Yes, sir.

Q. You knew that then?

Mr. Patterson: Their opinion?

Mr. McInerney: Did you ever take any examinations any place else and were turned down, for switchman on a railroad?

A. No, sir, I never went switching before. This was my first experience at switching.

Q. How about any other position on a railroad? Did you take another examination?

A. No. When I worked on the section I didn't have to have any.

Q. You didn't know that you would be turned down by Thompson and McMullen?

A. I didn't know for sure, no.

Q. Did you have any idea that you would be the first time?

Mr. Patterson: I object to that.

The Court: Objection sustained.

To which ruling of the Court, the defendant, by its Counsel, then and there duly excepted.

Mr. McInerney:

Q. But you did know, if you submitted yourself to an examination again, you would be rejected, didn't you?

A. Yes, sir.

Mr. Patterson: That is objected to. That is immaterial in this case. It doesn't make any difference. This man was at work there and they were accepting his services and paying him for a period of some months.

[fol. 64] The Court: His last answer may stand.

Mr. Patterson: I object to this line of inquiry.

Mr. McInerney: I think it is proper.

Mr. Patterson: I want to be heard on that.

The Court: There is no reason for being heard. I have made *by* ruling. Put your next question. Go on. The answer will stand.

Mr. McInerney:

Q. Did you ever say anything to anybody connected with the Soo Line after you went to work—did you ever advise them that you had not taken the physical examination?

A. No, sir.

Mr. Patterson: I object to that as immaterial.
The Court: Objection sustained.

To which ruling of the Court the defendant, by its Counsel, then and there duly excepted.

Mr. McInerney: I think that is all, unless I think of something else.

(A short recess was then taken.)

Redirect examination.

By Mr. Patterson:

Q. When bright headlights on locomotives were used in the yards there, what were they used for?
A. When we would go down to get a cut of cars we would turn on the bright headlights, about 20 feet from the cut of cars.
Q. Did you ever know them to be used in the yards there for any other purpose?
A. No.

Mr. Patterson:

Q. Who took the examination?
A. Adam Lenhart.

Mr. Patterson: That is all.

[fol. 65] Charles D. Anderson, called as a witness in behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Patterson:

Q. What is your name?
A. Charles D. Anderson.
Q. Where do you live?
A. 3449 Wesley Avenue, Berwyn, Illinois.
Q. What is your business?

A. I am Vice-president and General Organizer of the Railway Yardmaster's International.

Q. How long have you held that position?

A. Three years.

Q. How old a man are you?

A. Fifty-five.

Q. And before you had that work, what was your business?

A. General Yardmaster of the Illinois Central.

Q. For how long?

A. Eighteen years.

Q. Have you worked for other railroads?

A. All in Chicago, excepting the Rock Island, Great Western and Soo Line.

Q. That is all of the other roads that enter here except those three?

A. Yes, sir.

Q. In your work as Yardmaster and in your work for other railroads, have you had occasion to be about and in the yards of railroads in the City of Chicago, in 1924, and before that?

A. I have.

Q. And have you had occasion to notice and observe and know the general custom and manner of doing railroad work in railroad yards, on the various railroads in the City of Chicago?

A. I do. (I have.)

Q. In December, 1924, and before that, will you tell the court and jury, by yes or no, whether or not there was any general practice and custom in railroad yards in handling trains, cars and cabooses and locomotives, in re- [fol. 66] gard to the use of locomotive headlights while in the yards?

A. Yes, sir.

Q. Tell us what that custom and practice was?

A. You mean in regard to electric headlights?

Q. Yes, on locomotives.

A. Electric headlights, on approaching and entering a yard, are always dimmed.

Q. By that, what do you mean?

A. It means a softer light.

Q. In the electric headlights on locomotives, what different degrees of light can be made by them?

A. Two; one very strong and one very mild, soft.

Q. Have you been in the yard of the Soo Line at Kolze, here?

A. I have.

Q. Now, state whether or not, in your experience, if you know whether there was a general practice and custom by railroads in the City of Chicago, in shoving cabooses in yards, over lead tracks, in the night-time, to have a light on the forward end of the caboose so moved?

A. There is.

Q. What is that custom?

A. The custom is that there is a man with a light on the caboose shoving over the leads.

Q. Was that true in 1924 and before that?

A. Always before, yes, sir.

Q. Has your work as Yardmaster brought you into contact with the actual doing of the work on freight cars?

A. It did, yes, sir.

Mr. Patterson: That is all.

[fol. 67] Cross-examination.

By Mr. McInerney:

Q. What do you mean by going over a lead? Going out of one track on to a lead?

A. Out of one track—a lead—a lead leads off, it may be a dozen tracks or one track off of a lead.

Q. Coming on to a lead do they use the light? Is that right?

A. Coming on or going off, shoving the caboose ahead of the engine, yes, sir.

Q. Did you ever see that done in the Soo Line yard?

A. No, I wasn't out there at night time. I have never been there at night.

Q. You don't know whether it was the custom at the Kolze yard to have a light on the rear end of the caboose being shoved either into or off of a lead?

A. Those crews, when they come into my yard, had to do it.

Q. Answer the question.

(Pending question read.)

A. I don't.

Mr. McInerney: I move that the testimony of this witness, so far as this defendant is concerned, be stricken out, if the Court please. We are not bound by what other railroads do.

Mr. Patterson: Let me ask one other question before the court passes on the motion.

The Court: All right.

Mr. Patterson:

Q. When you referred to these railroads, all of them here, are you referring to all well-managed and *and* properly operated railroads?

A. I am.

Mr. McInerney: I object to that. Is this man going to judge what is a well-managed——

The Court: Just a minute. O*bj*ection sustained.

Mr. Patterson:

Q. Has your work brought you in contact with Soo Line crews?

A. It has.

[fol. 68] Q. And have those customs been followed in yards where you have observed Soo Line crews working?

A. Yes, sir.

Mr. McInerney: I object to that. He is cross-examining his own witness. This man has stated positively——

The Court: I don't agree with you about that. What is cross-examination about that?

Mr. McInerney: He says he has never seen men doing that in the Soo Line yards.

The Court: I am afraid you are not following the record. He has asked him whether, in the Soo Line yards, the Soo Line men followed a certain custom. It is not a question of what they did in the Soo Line yard. As I understand, the question is as to the practice of Soo Line crews in other yards.

Mr. Patterson: You misunderstood.

Mr. McInerney: He said it was work done in other yards where Soo Line men worked.

The Court: By Soo Line men, as I understood.

(Question read as follows: "And have those customs been followed in yards where you have observed Soo Line crews working?")

The Court: I did not so understand the question. The objection is sustained.

Mr. Patterson:

Q. Have you, during the period before December, 1924, seen and observed Soo Line switching crews and Soo Line trainmen handling cars, engines and cabooses in other yards than the Soo Line yard at Kolze?

A. I have.

Q. And have the customs and practices you have testified to been observed by those Soo Line men and crews in handling those cabooses, engines and cars in those other yards?

A. Yes, sir.

[fol. 69] Mr. McInerney: Pardon me; I object to that for the reason I stated when I made my motion to strike out the question. The question here is what happened in the Kolze yard; not what the crews did in other yards.

The Court: Is that the only objection to the question?

Mr. McInerney: And the other objection is that it calls for a conclusion.

The Court: Is that the only objection? If so, the objection is overruled.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

(Counsel and the court then conferred, out of the hearing of the jury.)

Mr. McInerney: If the court please, I now renew my motion to strike out the testimony of this witness insofar as it attempts to establish a custom of having lights on the rear end of cabooses being shoved in or off of the lead tracks at the Kolze yards.

The Court: The motion to strike out is allowed.

(Before the jury.)

Mr. Patterson: I have no other witnesses now, your Honor.

The Court: You have no other witnesses, Mr. Patterson?

Mr. Patterson: I have two more, but I couldn't get them here this afternoon.

The Court: Then we will adjourn until tomorrow morning.

Whereupon an adjournment was taken until 10 o'clock a. m., Friday, December 17, 1926.

[fol. 70] Friday, December 17, 1926—10 o'clock a. m.

Court met pursuant to adjournment.

Present: As before.

Mr. McInerney: Your Honor, with the Court's permission I would like to ask the plaintiff a few more questions.

Mr. Patterson: And I ask the privilege of recalling the plaintiff for a few questions in further direct examination.

The Court: All right, both of you may have your wish.

JOHN J. ROCK, the plaintiff, having been previously duly sworn, was recalled and further testified as follows:

Redirect examination.

By Mr. Patterson:

Q. You are John Rock, the plaintiff in this case, are you?

A. Yes, sir.

Q. During the fourteen months you worked for the Soo Line, prior to this accident, did your physical condition in any way interfere with your work?

A. No, sir.

Mr. McInerney: I object to that as calling for a conclusion.

The Court: Objection sustained to the question in that form. The substance of it is proper.

Mr. Patterson:

Q. What, if any, effect did your physical condition have on your doing the work as a switchman?

[fol. 71] Mr. McInerney: I object to that. It is the same question, asked in another way. That is not the way to arrive at that question.

The Court: It is proper, I think, for him to describe whether or not he did the work, how he did the work, what his physicial condition was, and let the jury determine whether it interfered or did not interfere with his work. The objection is sustained to the question in that form.

Mr. Patterson:

Q. Tell us, Mr. Rock, what work you did there for the Soo Line.

A. Well, I switched cars, jumping on—jumping on when switching. It never bothered me.

Mr. McInerney: I ask that "never bothered me" be stricken out.

The Court: Strike it out.

Mr. Patterson:

Q. Were you, at any time during the time you worked there, off work because of any physicial disability?

Mr. McInerney: I object to that as immaterial.

The Court: Objection overruled.

To which ruling of the court defendant, by its counsel, then and there duly excepted.

A. No, sir.

The Court: Let the record show that when a ruling is made against either party, the record may show an exception by the party against whom the ruling is made, as common sense and the law directs, whether counsel happens to think about it or not.

Mr. Patterson:

Q. You have testified that some days during the fourteen months you were not marked up for work?

A. No, sir.

Q. What did you do during those fourteen months on days when you were not marked up as being called?

Mr. McInerney: I object to that as immaterial and incompetent to the issues in this case; it does not tend to [fol. 72] prove anything before the jury and the jury couldn't answer that question.

Mr. Patterson: His physical condition. That is the only ground I am making the offer on.

The Court: You want to show whether he did or did not work?

Mr. Patterson: Yes.

The Court: He may answer with reference to that.

To which ruling of the court defendant, by its counsel, then and there duly excepted.

A. When I was not marked up on the board I work when sewer and water went into the tunnel, when I wasn't marked on the board for work.

Mr. Patterson:

Q. What did you do there?
A. I handled tiling, shoval and cement work.
Q. What kind of tile?
A. It wasn't this concrete tile. It was——
Q. What sort of tile?
A. Sewer tile; sewer tile—24 inch.

Recross-examination.

By Mr. McInerney:

Q. You stated that your name is John Rock—your surname is Rock—John Rock?
A. My name is—I go under John Rock now.
Q. Were you baptized John Rock?
A. No, sir.
Q. What was your name?
A. Joe——

Mr. Patterson: I object to that. He has answered that on direct examination, that his name was Joe Rock.

Mr. McInerney: Haven't I the right to cross-examine on it?

The Court: I think you covered it in your examination yesterday.

[fol. 73] Mr. McInerney: I did not cross-examine on that.

The Court: Gentlemen, make your objections and quit.

Mr. McInerney: The name that you got, however you got it, was Joe Rock?

A. Yes, sir.

Q. By that name you went until October 1, 1923, when you took the examination of the Soo Line? Is that right?

A. I took Joe Rock the first time.

Q. And that was your name?

A. That was my name.

Q. There never were any legal proceedings changing your name, were there?

A. No, sir.

Q. Then you changed your name voluntarily, without any legal proceedings, to John Rock?

Mr. Patterson: I object to that as immaterial.

The Court: He has answered that. He has said there were no legal proceedings. Objection sustained.

To which ruling of the court defendant by its counsel, then and there duly excepted.

By McInerney:

Q. Did you know at the time you filed an application with the Soo Line for employment in the name of John J. Rock, that their rules and regulations provided that before you could have employment as a switchman you must undergo a physical examination? Did you know that was a rule and regulation of the Soo Line?

A. I talked to O'Haire about that and he didn't object to it and he sent me——

Mr. McInerney:

Q. I ask to strike out that answer as not responsive to the question.

Mr. Patterson: I submit it should stand.

Mr. McInerney: The question can be answered yes or no.

The Court: I don't know who this man is he talked to. There is nothing showing who he is.

Mr. Patterson: I object to that for the further reason [fol. 74] that the rules and regulations are the best evidence.

The Court: If he knows, he may state. If he doesn't know he may so state.

To which ruling of the court plaintiff, by his counsel, then and there duly excepted.

Mr. McInerney:

Q. You did?

A. No, I didn't. I don't get you.

The Court: "I didn't" he says.

Mr. McInerney:

Q. Why didn't you take the physical examination in the first instance?

A. To go to work.

Q. You did take one?

A. Yes, sir.

Q. And you knew that in the next application you would also be obligated to take one? Did you?

A. Yes, sir.

Q. And that is why you got a substitute?

A. Yes, sir.

Q. Who told you you had to take a physical examination to become an employee of the Soo Line?

A. Jack O'Haire.

Q. You did know it——

A. Yes, sir.

Q. You did know it was necessary?

A. Yes, sir.

Q. When you said you didn't you were mistaken, weren't you?

Mr. Patterson: I object to that, because his answer a moment ago was that he didn't know about the rules and regulations; that he got his information from O'Haire.

The Court: Objection sustained to the last question previously asked.

[fol. 75] Redirect examination.

By Mr. Patterson:

Q. Who is this man, O'Haire?

A. He is the yardmaster.

Q. Who for?

A. The Soo Lines.

Q. That is the defendant in this case?

A. Yes, sir.

Q. And when you went there and applied for the first time, that was on October 1, you said?

A. Around there. Either just the last or the first of October.

Q. Did you see O'Haire then?

A. Yes, sir.

Q. Make out your application there?

A. He just gave me a slip to go to the superintendent's office.

[fol. 76] Q. And you went?

A. Yes, sir.

Q. When you went for work the second day who did you see?

A. Jack O'Haire.

Q. The same man?

A. Yes, sir.

Q. Did you know then that you had been rejected before?

A. Yes, sir.

Q. Did you have any talk with O'Haire about that?

A. Yes, sir.

Q. And what was said by him to you in regard to further application for work?

A. Well, I went there and I said, "Man, you sent me down under the name of John Rock," and he says "Yes"; so he sits down and gives me another slip. I gave him a few cigars and I went down there.

Q. Did he write the name John Rock there?

A. Yes, sir.

Q. And you went where?

A. I went to the superintendent's office.

Q. What did he say, if anything, in regard to passing the next examination?

A. At the superintendent's office you mean?

Q. No, O'Haire?

A. He didn't say a word about it.

Q. When you got to the superintendent's office what was done there, the second time?

A. He took my name and made out a slip. He said, "Wasn't you here before?"

Q. Did you tell him?

A. I said, "My brother was here."

Q. And then you went to the doctor?

A. And I went to the doctor.

Q. Or the other man went to the doctor?

A. Both of us went up there and he took the examination.

Q. And you were then given employment?

A. It was marked on the board when I got back there that night.

[fol. 77] Q. The same day?

A. The same day. They called right up as soon as I got the application in.

Q. During the fourteen months you worked there were you paid by the Soo Line each month? Did you get paid for your services?

A. Yes, sir.

Q. And you were under whose supervision?

A. John O'Haire's, the yardmaster.

Q. Is that the one you called "Jack" awhile ago?

A. Yes, sir.

Q. Jack and John O'Haire are one and the same man?

A. Yes, sir.

Recross-examination.

By Mr. McInerney:

Q. Did O'Haire know you had been rejected?

A. Yes, sir.

Q. When did you tell him that? How did he know it?

A. When I went back the first time he said, "What do you think? You are turned down."

Q. Did he say why?

A. No, he didn't say why.

Q. How did you know he knew you had not passed the physical examination?

A. He must have called up.

Q. You didn't know, did you?

A. Only what he told me.

Q. Did he tell you you had been turned down because you were not physically competent to work for the Soo Line?

A. No; he said, "You are turned down."

Q. "You are turned down"? and you didn't know for what reason?

A. No.

Q. How did you know you were turned down because of your physical disability?

A. Because the doctor told me.

Q. When did you go to the doctor?

A. When I went the first time.

Q. Did he tell you the same day you went there?

A. He told me, "You have a light rupture. You can't pass."

Q. Did he tell you why you couldn't pass?

[fol. 78] A. He said, "You have a light rupture. You can't pass."

Q. Did he tell you that was because of the rules of the company?

A. He didn't say no more then. I walked out.

Q. When you went with your slip to the superintendent again and he asked you if you were there before, you said you were not there before?

A. No. I said, "My brother was here."

Q. Did you say whether you were there before or not?

A. No. That is all that was said.

Q. You took Lenhart out to the doctor's office with you?

A. Yes, sir.

Q. And you remained outside?

A. I sat in the office; in the waiting room.

Q. You went up to the office?

A. I went up to the waiting room.

Q. Did you say anything to the doctors at that time?

A. I didn't see nobody.

Q. You didn't see the doctors at that time?

A. No, sir.

Q. Lenhart went up and said, "I am John J. Rock"?

A. Yes, sir.
Q. And he was examined and he passed?
A. Yes, sir.

Mr. McInerney: That is all.
Mr. Patterson: That is all.

J. C. Lippman, called as a witness in behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Patterson:

Q. What is your name?
A. J. C. Lippman.
Q. Where do you live?
A. River Grove, Illinois.
Q. How old a man are you?
A. Thirty-eight.
Q. What is your business now?
A. Switchman.
[fol. 79] Q. Are you working as a switchman now?
A. Yes, sir.
Q. For what road?
A. The St. Paul.
Q. And for how long have you done railroad work, switching and the like?
A. Practically, about 18 years.
Q. Did you ever work for the Soo Line?
A. Yes, sir.
Q. And for how long?
A. Eight years, lacking thirty days.
Q. And when did you leave the Soo Line's employment?
A. May 26, 1925.
Q. Were you working for the Soo Line in December, 1924, and before that?
A. Yes, sir.
Q. Where at?
A. Kolze.
Q. The Kolze yards?
A. The Kolze yards.

Q. How long did you work in and around the Kolze yard before December, 1924?

A. Practically seven years.

Q. What doing?

A. Switchman.

Q. Did you ever do any work as acting yardmaster there?

A. Yes, sir.

Q. For how long?

A. Practically, about ten months.

Q. Were you familiar with the custom and practice in force in those yards and on the lead tracks, north of Irving Park boulevard——

A. Yes, sir.

Q. Wait until I finish the question——

Q. (continued). In the movement of trains, engines, cabooses and cars?

A. Yes, sir.

Q. Answer this question by yes or no. Was there any custom or practice in the yards there and on the tracks north of Irving, in December, 1924, and before that, in regard to the use of electric headlights on locomotive engines?

A. Yes, sir.

[fol. 80] Q. What was that general custom and practice, as locomotive engines came into and approached the place I have spoken about?

A. To dim their headlight.

Q. What do you mean by that?

A. In order to keep the switchmen from blinding, so they could see.

Q. Now, was there any general rule or custom in force and effect there, in December, 1924, and before that, when cabooses were shoved along the lead track over Irving Park boulevard and north of Irving Park boulevard, in regard to men on the cabooses or light on the cabooses at night time?

Mr. McInerney: I object to that as calling for a conclusion. The way to establish custom is to answer that yes or no; prove the things that occurred and let the jury say. His information is not valuable on that subject at all.

The Court: Objection overruled.

To which ruling of the court defendant, by its counsel, then and there duly excepted.

Mr. Patterson: Answer it yes or no.

A. Yes, sir.

Q. What was the custom and practice that were followed there in December, 1924, and before, in the night time, shoving cabooses over that lead track?

A. For a man to be on the leading car with a light.

Q. Are you familiar with the lay of the land there, north of Irving Park boulevard, on up to where those leads of switch tracks go?

A. Yes, sir.

Q. What use, if you know, was the track put to from the oil houses, on the west side, the depot and the spur tracks on the east side? What was there north of Irving Park boulevard there between those two points?

A. There was an oil house.

Q. Well, from the oil house across the track?

[fol. 81] A. Direct west of the depot is an oil house, where you have to go over to fill your lanterns.

Q. Was that true in December, 1924, and before?

A. Yes, sir.

Q. To what extent, how much, was that used by trains?

A. That was practically used at all hours of the day.

Q. How about night?

A. Especially in the evening, filling lanterns.

Q. Day and night?

A. Day and night.

Cross-examination.

By Mr. McInerney:

Q. Were you at the Soo Line when the new lead switch was there—the new lead track?

A. Yes, sir.

Q. Were you familiar with this movement that they made of cabooses every night for the time freights on old lead number 2, pushing them in?

A. Yes, sir.

Q. Did you ever work on that job?

A. Yes, sir.

Q. How?

A. Yes, sir.

Q. You regard a caboose the same as any other car; there is no different rule or custom with reference to cabooses than any other freight car, is there?

A. Yes, there should be.

Q. I asked you if there was?

A. Yes, sir.

Q. When you are shoving cabooses there is a different rule than there is with any other freight car?

A. Not exactly. A man should be on the leading car shoving over there.

Q. A car is a caboose and a caboose is a car. Is there any difference, as far as your testimony is concerned, between a car and a caboose?

A. Yes, sir.

Q. You think there is a different rule with reference to empty cabooses being shoved on to a switch track?

A. I don't know about empty. There are people staying in empty cabooses.

[fol. 82] Q. I want you to refer to empty cabooses, two of them being shoved into switch tracks, being put on overtime freight?

A. Yes, sir.

Q. They go into number 2 lead, being pushed into those tracks to be hooked on to time freights?

A. Yes, sir.

Q. You know about that?

A. Yes, sir.

Q. You have been on that movement?

A. Yes, sir.

Q. Those cabooses are empty, aren't they?

A. No, not all the time.

Q. Suppose they are empty. They were this night?

Mr. Patterson: There is no evidence on that.

Mr. McInerney:

Q. Assume they are empty.

A. Yes, sir.

Q. When they were filled who was over there in them?

A. The lead man, the brakeman.

Q. In the cabooses to be hooked on to a train?

A. Yes, sir.

Q. Before it is on there?

A. Yes, sir.

Q. You mean the men who are eventually going to take the train out?

A. Yes, sir.

Q. And it is the practice for them to get in there?

A. Yes, sir, they stay in there; cook and sleep in there and eat.

Q. There is a custom as to cabooses different than as to freight cars, is there?

A. Yes, sir.

Q. Being pushed in to those tracks?

A. Not exactly when they are being pushed.

Q. When they are being pushed in to those tracks?

A. Not exactly; when they are being pushed into the tracks they have a man on the leading car.

Q. No matter if it is a freight or a caboose car?

A. Yes, sir.

Q. It is the same custom?

A. Yes, in order to ride in and——

[fol. 83] Q. The leading car is what you are talking about?

A. Yes, sir.

Q. Is there a rule on that?

A. There surely must be.

Q. You have read the rules?

A. Yes.

Q. How?

A. Yes, sir.

Q. You say there is a rule that requires a man on the leading car, where cars are being switched in railroad yards——

A. Not where——

Mr. McInerney: Wait a moment.

Mr. Patterson: That is objected to.

The Court: Objection sustained.

To which ruling of the court defendant, by its counsel, then and there duly excepted.

Mr. McInerney:

Q. Do you know whether there is such a rule?

Mr. Patterson: That is objected to.
The Court: Objection sustained.

To which ruling of the court defendant, by its counsel, then and there duly excepted.

Mr. McInerney:

Q. Is the placing of a man on the leading car in a yard, in switching and making up trains—is that the rule in the Soo Line yards and the custom?

Mr. Patterson: Objected to because we are referring to cabooses here.
The Court: Objection sustained to the question; so there will be no misunderstanding between counsel, you are using, apparently, interchangeably, the words "custom" and "rules." He was asked in the examination in chief with reference to general custom and practice there. Anything with reference to that is proper. What the rules are is not proper cross-examination.

To which ruling of the court defendant, by its counsel, then and there duly excepted.

[fol. 84] Mr. McInerney:

Q. Do you say that it is the general custom and practice in the Soo Line yard at Kolze, to have a man with a light on the leading car, where cars are being pushed in the yards proper?

Mr. Patterson: Objected to, because the testimony is that this is a lead track before you come to any switch tracks.
Mr. McInerney: I asked in the yards.
The Court: He may answer.

A. It is customary, where you are shoving into a track, to be on the leading car in order to make the joint of the cars in there.
Q. If there are cars in there?
A. In order to make the joint you have to be down there.
Q. Suppose the fellow that is shoving those cars in there

knows what is in that switch tra[illegible], is there any necessity for a light then?

Mr. Patterson: Objected to.

The Court: Objection sustained. You are asking him now if there is any reason for it.

Mr. McInerney: He just said there was.

(The question was read.)

The Court: Objection sustained.

To which ruling of the court defendant, by its counsel, then and there duly excepted.

Mr. McInerney:

Q. Is it the custom, then, to have a man on the leading car with a light?

Mr. Patterson: Objected to because it doesn't bear on this case.

The Court: He may answer.

Mr. McInerney: I will put it so he will understand it.

Q. You said they had to have a light in there so they could make a connection with the car inside, did you?

[fol. 85] Mr. Patterson: Objected to.

The Court: Objection sustained.

Mr. McInerney:

Q. Did you say that?

The Court: The record, Mr. counsel, shows what he said. The way to find out what he said is by examination of the record.

To which ruling of the court defendant, by its counsel, then and there duly excepted.

Mr. McInerney:

Q. (Read as follows: "Do you say that it is the general custom and practice in the Soo Line yard at Kolze, to have a man with a light on the leading car, where cars are being pushed in the yard proper?")

Q. What do you mean by that?

A. To be down there at them cars, to protect them from being in there.

Q. Please explain your answer.

A. If you are shoving into a track and there is cars in there, if you are making up a train you have to make up the joint.

Q. You mean you have to have a man on the lead car to go down there to make the connection?

A. Certainly somebody has to be down there.

Q. Is that why he is there?

A. That is why he is on that car, yes.

Q. That is why he carries the light?

A. In order to give signals.

Q. Are there any circumstances under which it would not be necessary to have a man on the leading car?

Mr. Patterson: Objected to.

The Court: Objection sustained.

To which ruling of the court defendant, by its counsel, then and there duly excepted.

Mr. McInerney:

Q. Do you know how many cars are handled in the Soo Line yards every night?

[fol. 86] Mr. Patterson: Objected to. I withdraw the objection.

The Court: The question is, do you know. Tell them whether you know. If you don't, say so.

The Witness: How many cars are handled in the yard at night?

Mr. McInerney: Yes.

A. I have no idea what is handled there now. We have handled six or eight hundred in 24 hours.

Q. Those are all handled in making up trains, breaking up trains and getting trains ready, aren't they?

A. Coming in and going out.

Q. And a good many are kicked?

A. When they are switched they are kicked.

Q. A man takes the pin between the leading car and the next car, releases the pin, the engines makes a kick and the car goes; is that right?

A. Yes, sir.

Q. How many men are usually on a switching movement like that?

A. Three men.

Q. Where are they stationed?

A. The pin puller is on his cut; the leader is on the lead and the other man is making switches.

Q. Who is on the leading car?

Mr. Patterson: Objected to, because that is talking about something that is not in this case. We have two cabooses being shoved over the lead track by an engine.

The Court: He may answer.

A. The pin puller would be on the leading car.

Mr. McInerney:

Q. That is his job?

A. Yes, sir. It would be his job this night.

Q. When they were pushing in the two cabooses?

A. Either him or the hind man. The hind man would be going in to make the joint.

Q. So it would not be the pin man, would it?

[fol. 87] A. Not practically, no.

Q. He gets on the cars as they cross a crossing—a public crossing?

A. Well, that would be hard to explain—whoever would be there. The hind man should be there while the head man is shoving cars.

Q. The hind man?

A. Yes, the hind man, to protect the crossing.

Q. When did you leave the Soo Line?

A. May 26, 1925.

Q. What were the circumstances surrounding that?

A. I showed up late for work.

Q. What?

A. I showed up late for work.

Q. You were discharged, were you?

A. Yes, sir.

Redirect examination.

By Mr. Patterson:

Q. How soon after that did you go to work for the St. Paul?

A. July 28, 1926.

Mr. Patterson: That is all.

James Eade, called as a witness in behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Patterson:

Q. What is your name?
A. James Eade.
Q. Where do you live?
A. Franklin Park, Illinois.
Q. What is your business?
A. Painters' supplies.
Q. How old a man are you?
A. Forty-two.
Q. Did you ever work for the Soo Line?
A. Yes, sir.
Q. By "Soo Line" I guess we all understand that is the defendant, Mr. McInerney?

Mr. McInerney: Yes.

Mr. Patterson:

Q. How long did you work for them?
[fol. 88] A. About two years and three or four months.
Q. Did you work there in December, 1924?
A. Yes, sir.
Q. And before that?
A. I started in February, 1924.
Q. You started in February, 1924? When did you quit?
A. Last June.
Q. Why did you quit?
A. I just resigned.

Q. Voluntarily resigned, did you?

A. Yes, sir.

Q. Where did you work for the Soo Line? What yard?

A. At the Kolze yard.

Q. How long did you work in and around the Kolze yard of the Soo Line?

A. Practically all of the time I was there, over two years.

Q. What job did you have?

A. Well, I had different jobs, down town and out there—both ends of the job.

Q. That is back and forth, between Canal street and Kolze?

A. Yes.

Q. Were you a switchman or what?

A. Switchman and conductor.

Q. You were a conductor some of the time?

A. Yes, sir.

Q. In the time that you worked there were you familiar with the general customs and practices in force and effect on the yard, there, north of Irving Park boulevard, the Kolze yard, in regard to the handling of cars, trains, locomotives, engines, cabooses and so on?

A. Yes, sir.

Q. Was there any general custom or practice in December, 1924, and before that, on the Soo Line, in that yard out there, in regard to the use of a locomotive headlight on road engines or engines bringing trains into the yard—answer yes or no.

A. Yes.

[fol. 89] Q. What was that general custom or practice?

A. After entering the lead or coming off of the main line, to dim your lights.

Q. What lights do you mean?

A. The headlight.

Q. On the locomotive?

A. Yes, sir.

Q. Now, in December, 1924, and before that, was there any general custom and practice in force and effect in that same yard there in regard to men or lights being on the foremost caboose when locomotive engines were shoving the cabooses? Answer yes or no.

Mr. McInerney: I object to that as calling for a conclusion; asking for an opinion of the witness instead of stating the facts.

The Court: Objection overruled.

To which ruling of the court defendant, by its counsel, then and there duly excepted.

Mr. Patterson:

Q. Your answer is what?

A. Yes, sir.

Q. What was that general custom and practice and what was done there, on December, 1924, and before when a locomotive engine was shoving Soo cabooses or cabooses north on the lead track there?

A. A man always rode the engine.

Q. Which end? "Rode the engine"—what do you mean?

A. The hind end that they were shoving.

Q. That is the foremost end, you mean?

A. Yes, sir.

Q. And at night time what was the general practice and what did these men do as they rode the head end, shoving north, in regard to lights or lanterns?

A. He always had a lantern, a white light, with him.

Q. To what extent were the tracks used by employees there, in 1924, and before, between the oil houses, over on the west side, and the depot or spur tracks over on the east side?

A. How many tracks you mean?

[fol. 90] Q. No; what use was made of those tracks by the switchmen passing from the oil houses over there, over to the depot?

A. They crossed back and forth to fill their lamps. Every time they wanted to fill a lamp they had to go over there.

Q. What else was over there on the west side that the men frequented?

A. A restaurant

Q. And freight houses over there?

A. Yes, sir.

Q. Were the tracks at that point used little or much?

A. Much.

Q. Used day time or night or both?

A. Both.

Mr. Patterson: That is all. Cross-examine.

Cross-examination.

By Mr. McInerney:

Q. Can you give me the name of one man who worked in the Kolze yard, carrying a lantern, on the leading car, where they were being switched in the yard during the time you were there?

Mr. Patterson: Objected to unless he confines it to——
The Court: He may answer.

A. This is not switching when you are shoving.

Mr. McInerney:

Q. They don't call that switching?
A. No, sir.
Q. When they are being pushed in the yard?
A. Yes, sir.
Q. Give the names of some of them.
A. Hudson, Johnson——
Q. What is Johnson's first name?
A. Roy, I think, or Le Roy; Cutler; Max—a fellow named Smith that lives in Des Plaines. They have a wrestler, Max something his name is; I forget his last name; but all of them—practically all of them.
[fol. 91] Q. Max something? Is that all that you remember?
A. I have forgot his last name.
Q. Is that all of the names that you remember?
A. That is all.
Q. Are those all that you remember, seeing yourself standing on the lead car while being pushed, the cars being pushed, with a lantern?
A. Jim Haskins.
Q. Who?
A. Jim Haskins.
Q. What was your connection with the movements that you saw those men make? What did you have to do with them?
A. It depends on which end I was working. If I was on the hind end, I used to ride that car in.

Q. Did you ever work on a caboose movement where they took two cabooses and pushed them into lead track number 3?

A. Yes, sir.

Q. You have worked on that?

A. Yes, sir.

Q. Did you ever see anybody on the lead car of that caboose, up to the time it was getting off of the lead, with a lantern in his hand?

A. Yes, sir.

Q. Who did you see?

A. Myself.

Q. How many times did you do it?

A. Every time I went over there with a caboose when I was working on the hind end.

Q. What did you do when you got on the switch track? When you got on the lead what did you do?

A. When I got on the lead I got off.

Q. They kicked the car in there, did they?

A. Some times they did and some times they shoved it in.

Q. Suppose they kicked it in what did you do?

A. Ride it in and set the brake.

Q. You didn't make the connection?

A. No, sir. The trains are not made up there. They shove the cars on the track to get them afterwards for the [fol. 92] trains.

Q. Do they ever kick them without a man on the rear end?

A. No. There are men sleeping in those cabooses.

Q. And they are never kicked without a man on the rear end?

A. No, sir.

Q. You never saw that done?

A. No, sir.

Q. Did you ever see them kicked there without a man on them with a lantern, or on a shove into that lead?

A. No; that is the same question you asked before.

Q. You never saw a man on that movement—or that movement made without a man on the rear end?

A. No, sir, unless they got off of the lead.

Q. What do you mean by "off of the lead"?

A. After they got off of a certain track. The lead is the main track for all the tracks.

Q. Do you recognize this?

(Indicating plat, defendant's exhibit 1.)

Q. This movement we are talking about was on what they call the old lead, or the old yard lead track, wasn't it?
A. Yes, sir.
Q. How is that?
A. Yes, sir.

Mr. Patterson: I object to that as not cross-examination. How does this man know?
The Court: Objection sustained.

To which ruling of the court defendant, by its counsel, then and there duly excepted.

Mr. McInerney:

Q. Where is it shown on this map that the man boards the loading car on the caboose movement that you have described?
A. Away back at the main line switch where they cross over. They get the cabooses on the other side of the depot, cross over on the main line and shove down on this lead.
[fol. 93] Q. And he stays there all the time?
A. Yes, sir.

Mr. McInerney: That is all.

Wherefore the plaintiff rested his case.

COLLOQUY BETWEEN COURT AND COUNSEL

(The following proceedings took place in chambers, out of the presence of the jury.)

The Court: What have you here, a motion to direct a verdict?
Mr. McInerney: Yes, your Honor, and a motion as to each count, a general motion to direct a finding of the defendant not guilty.

(Argument on motions.)

The Court: I am not going to direct a verdict at this time. * * * I will deny the motion to direct a verdict at this time.

Mr. McInerney: I suppose the Court has in mind that the plaintiff was physically incompetent to fill the position.

The Court: I have in mind what the record shows; that this man did not disclose his condition and that he obtained his employment by virtue of the representation he made, with the assistance of somebody else.

Mr. McInerney: And that he had been declared incompetent by the examination?

[fol. 94] The Court: I am taking into consideration the record in this case. These numerous things, I take it, without reading them, are as to the counts of the declaration?

Mr. McInerney: Yes, sir.

The Court: Let the record show, so there will be no question about it, that each of these several motions to direct a verdict of not guilty, as to each and the several counts of the Declaration, that each motion is refused and so marked.

And, thereupon, immediately at the close of the Plaintiff's case, and before any further proceedings were had in said cause, counsel for Defendant made and filed the following motion in writing, to-wit:

In Circuit Court of Cook County

[Title omitted]

Motions for Directed Verdict

And now comes the Minneapolis, St. Paul and Saulte St. Marie Railway Company, a corporation, defendant, by John L. McInerney, its attorney, at the close of all the evidence for the plaintiff, and moves the court to exclude from the jury all the evidence offered and received on the part and on behalf of said plaintiff, and to give to said jury [fol. 95] the following instructions, viz:

The court instructs the jury to find the defendant not guilty.

John L. McInerney, Attorney for Defendant.

And with said motion counsel for Defendant presented to the Court the following instruction, in writing, and requested that it be given to the jury:

The court instructs the jury to find for the defendant not guilty.

But the Court overruled said motion and refused to give said instruction; to which said rulings of the Court, and each of them, the Defendant, by its counsel, then and there duly excepted.

And, thereupon, further, at the close of the Plaintiff's case, and before any further proceedings were had in said cause, counsel for Defendant made and filed the following motion, in writing, to-wit:

[fol. 96] [Title omitted]

Motion

And now comes the Minneapolis, St. Paul and Saulte Ste. Marie Railway Company, a corporation, defendant, by John L. McInerney, its attorney, at the close of all the evidence for the plaintiff, and moves the court to exclude from the jury all the evidence offered and received on the part and on behalf of said plaintiff, and to give to said jury the following instruction, viz.:

The jury are instructed that the plaintiff cannot recover under the first count of the declaration filed herein and you must disregard said count.

John J. McInerney, Attorney of Defendant.

And, thereupon, with the aforesaid motion, counsel for Defendant presented to the Court the following instruction, in writing, and requested that it be given to the jury:

The jury are instructed that the plaintiff cannot recover [fol. 97] under the first count of the Declaration filed herein and you must disregard said count.

But the Court overruled said motion and refused to give said instruction; to which rulings of the Court, and each of them, the Defendant, by its counsel, then and there duly excepted.

And thereupon, further, at the close of the Plaintiff's case, and before any further proceedings were had in said cause, counsel for Defendant made and filed the following motion, in writing, to-wit:

[Title omitted]

Motion

And now comes the Minneapolis, St. Paul and Sault Ste. Marie Railway Company, a corporation, defendant, by John L. McInerney, its attorney, at the close of all the evidence for the Plaintiff, and moves the Court to exclude from the jury all the evidence offered and received on the part and [fol. 98] on behalf of said Plaintiff, and to give to said jury the following instruction, viz:

"The Jury are instructed that the Plaintiff cannot recover under the second count of the Declaration filed herein, and you must disregard said count."

John L. McInerney, Attorney for Defendant.

And, thereupon, with the aforesaid motion, counsel for Defendant presented to the Court the following instruction in writing, and requested that it be given to the jury:

The Jury are instructed that the Plaintiff cannot recover under the second count of the Declaration filed herein, and you must disregard said count.

But the Court overruled said motion and refused to give said instruction; to which rulings of the Court, and each of them, the Defendant, by its counsel, then and there duly excepted.

And, thereupon, further, at the close of the Plaintiff's case, and before any further proceedings were had in said cause, counsel for Defendant made and filed the following motion, in writing, to-wit:

[fol. 99] [Title omitted]

Motion

And now comes the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, Defendant, by John L. McInerney, its attorney, at the close of all the evidence for the Plaintiff, and moves the Court to exclude from the jury all the evidence offered and received on the part and on behalf of said Plaintiff, and to give to said jury the following instruction, viz:

"The jury are instructed that the Plaintiff cannot recover under the third count of the Declaration filed herein and you must disregard said count."

John L. McInerney, Attorney for Defendant.

[fol. 100] And, thereupon, with the aforesaid motion, counsel for Defendant presented to the Court the following instruction, in writing, and requested that it be given to the jury:

"The jury are instructed that the Plaintiff cannot recover under the third count of the Declaration filed herein and you must disregard said Count."

But the Court overruled said motion and refused to give said instruction; to which rulings of the Court, and each of them, the Defendant, by its counsel, then and there duly excepted.

And, thereupon, further, at the close of the Plaintiff's case, and before any further proceedings were had in said cause, counsel for Defendant made and filed the following motion, in writing, to wit:

[Title omitted]

[fol. 101] Motion

And now comes the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, Defendant, by John L. McInerney, its attorney, at the close of all the evidence for the Plaintiff, and moves the Court to exclude from the jury all the evidence offered and received on the part and on behalf of said Plaintiff, and to give to said jury the following instruction, viz:

"The Jury are instructed that the Plaintiff cannot recover under the fourth count of the Declaration filed herein and you must disregard said count."

John L. McInerney, Attorney for Defendant.

And, thereupon, with the aforesaid motion, counsel for Defendant presented to the Court the following instruction, in writing, and requested that it be given to the jury:

The Jury are instructed that the Plaintiff cannot recover under the fourth count of the Declaration filed herein and you must disregard said count.

But the Court overruled said motion and refused to give said instruction; to which rulings of the Court, and each of them, the Defendant, by its counsel, then and there duly excepted.

[fol. 102] And thereupon, the Defendant, to maintain the issues in its behalf, introduced the following evidence:

L. E. Loomis, called as a witness in behalf of the Defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McInerney:

Q. Give your full name?
A. L. E. Loomis.
Q. Where do you live?
A. Minneapolis, Minnesota.
Q. What is your occupation?
A. Civil engineer and surveyor.
Q. By whom are you employed?
A. By the Soo Line Railroad Company.
Q. Look at this map, marked Defendant's Exhibit 1 for identification, and state whether that map was made by you?
A. Yes, sir.
Q. From what information did you make it?
A. It was made from a survey that I made, at Schiller park.

Q. When did you make the survey?

A. February 23, 1926.

Q. Is that the same condition as was there in December, 1924, so far as it purports to show?

Mr. Patterson: If he knows.

A. Well, I don't know personally; on the map, I put in dotted lines, some car bodies and freight house, I think, that were not there at the time that I made the survey, but that were supposed to be there at the time the accident happened.

Mr. Patterson: If you say, Mr. McInerney, that these buildings were there at the time, all right.

[fol. 103] Mr. McInerney: They were there; he knows they were there.

Q. You got them from other information, from other maps?

A. From our records, yes.

Q. But there have since been removed?

A. Yes, sir.

Q. So that map correctly represents——

The Court: Maybe you can agree about it.

Mr. Patterson: I have no objection.

Mr. McInerney: I will offer it in evidence, if the court please.

The Court: All right.

(Here follows Defendant's Exhibit No. 1, marked Side folio page 104)

[fol. 105] Mr. McInerney: I ask that this map be marked defendant's exhibit 1.

Thereupon said map, heretofore marked defendant's exhibit 1 for identification, was received in evidence and was marked defendant's exhibit 1, and the same is hereto attached.

Mr. McInerney: I wish you would step down here so I can ask you a few questions for the record.

(Counsel and the witness stand in front of said defendant's exhibit 1 fastened to the wall.)

DEFENDANT'S EXHI

HIBIT NO. 1

SITUATION MAP
EAST PORTION OF YARD AT
SCHILLER PARK, ILL.

Mr. Patterson: My objection to that is that there is no proof that the plaintiff ever saw that rule as to physical examination.

Mr. Mc Inerney: I withdraw the offer.

JOHN P. O'HAIRE, called as a witness in behalf of defendant, having been first duly sworn, testified as follows:

[fol. 108] Direct examination by Mr. McInerney:

Q. What is your name?
A. John P. O'Haire.
Q. Where do you live?
A. 242 Franklin avenue, River Forest.
Q. What is your occupation?
A. General Yardmaster for the Soo Line Railway.
Q. How long have you been general yardmaster?
A. Since September 20, 1920.
Q. What were you before that?
A. Assistant General Yardmaster.
Q. How long have you been connected with the Soo Line?
A. Since February 26, 1911.
Q. Have you been here all the time?
A. Yes, sir.
Q. At the Kolze yard?
A. At the Kolze yard, yes, sir.
Q. What were you before you were assistant yardmaster?
A. I was foreman of an engine.
Q. What is the foreman of an engine?
A. He is in charge of the switching crews.
Q. In the yards?
A. In the yard limits. I was employed as a switchman, classed as a switchman.
Q. And all the time you were connected with the Kolze yard, were you?
A. Yes, sir.
Q. Did you work any other place for the Soo Line excepting the Kolze yard during that period?
A. No, sir.

Q. Except that you might go down to Canal street or something of that sort?

A. Just in our yard limits, that is all; our transfer limits.

Q. Your yard limits?

A. Yes, sir.

Q. Now, there is a movement there every night which contemplates taking some cabooses from a track east of the depot, over old lead track number 2, into the yard north of that point, isn't there?

A. Yes, sir.

[fol. 109] Q. What has to be done with these cabooses when they are finaly delivered to their destination? What are they for?

Mr. Patterson: Objected to now, unless we are talking about these two cabooses.

Mr. McInerney:

Q. Take two cabooses of the kind in question; you know all about them, don't you?

Mr. Patterson: I object to that.

Mr. McInerney: I would like to be heard upon that.

The Court: There is no reason for being heard upon that. He says he knows about those cabooses.

Mr. McInerney: But I want to ask him about other nights. Objection was made to the other question.

The Court: He answered the question. That answer may stand.

Mr. McInerney: All right.

Q. How many times have you seen that movement that I have described, carrying cabooses from the track east of the depot, pushing them over old lead track number 2 in a northerly direction—how many times during the time you were there have you seen that movement?

A. It was customary every night.

Mr. Patterson: I ask to strike that out.

The Court: It will be stricken out as not responsive. Just answer the question he asked you.

Mr. McInerney:

Q. How many times, per week or per month, did you see that movement?

A. Well, I do it every day. I am on days.

Q. How many times have you seen it at night?

A. All the time that I was on night duty.

Q. Well, about how many times a week would that be, just generally?

Mr. Patterson: I object to it unless it is confined to December, 1924, and before that.

The Court: Prior to that time.

[fol. 110] Mr. McInerney: Prior to that time, prior to 1924, in December?

A. Every night, seven days a week.

Q. What is the practice in the Soo Line yards, or was the practice, in December, 1924, and prior thereto, with reference to whether or not a man was stationed on the leading caboose, where it was being shoved from a lead into the switch track? Describe it, from the time they leave the east track, where they are stored, to the time they are kicked off or pushed off the lead track? What happens on the leading car?

A. There is a man placed on the rear end of the leading car over the main line movement and over public highways.

Q. Where is the man stationed with reference to lead track number 2—you mean crossing Irving Park boulevard?

A. Yes, sir. He is on the rear platform crossing Irving Park boulevard.

Q. Well, after they proceed north of Irving Park boulevard, what is the practice?

A. Why, wherever they are going—

Mr. Patterson: I object to the answer.

The Court: Go ahead.

A. (Continued:) Wherever they are going to put the cars in the track there is nobody riding them.

Mr. McInerney:

Q. There is nobody riding what?

A. Riding the rear platform.

Q. Are there any circumstances under which a man rides the rear platform in a movement of this character?

A. When they are coupling them on to the rear end of a train.

Q. Are you able to state the fact as to whether or not the caboose in question at this time, this night, was to be coupled on the rear of a train?

A. No, sir, it was not. It was just being placed on track [fol. 111] number 2 to be stored.

Q. Do you know the plaintiff in this case?

A. I do.

Q. Did you ever talk with him about getting in the employment of the Soo Line?

A. I sent him down to be employed as a student switchman.

Q. When was that, do you know?

A. In about the middle part of October, 1923.

Q. Was anything said at that time about his making an application under another name besides his own?

A. No, sir.

Q. How many applications did he make that you know of?

A. Just the one that I know of.

Q. And under what name was that?

A. John J. Rock.

Q. Did you know at that time that he had been rejected under the name of Joe Rock, by your doctors?

A. I did not, no sir.

Q. With reference to the round houses shown on this map, or what they call freight house and car bodies; what are those used for?

A. Why, one of them is used for the switchmen to keep their lanterns and clothes in. The other was used for car repair men.

Q. Is there any defined path of any place opposite to these car bodies, easterly, across the right of way?

A. No, sir, there is not.

Q. What is the fact with reference to the use of that right of way by employees of the company, as to whether they use any part of the place to cross the right of way?

A. There is merely a short cut across to the eating house. There is no path at all.

Q. Is there any particular point crossing the tracks that [fol. 112] was used generally by the men?

A. No, sir.

Q. You were not there the night of the accident, were you?

A. No, sir, I was not. I was at home.

Mr. McInerney: That is all.

Cross-examination by Mr. Patterson:

Q. I thought you said, a moment ago, that you knew these two cabosses being moved over there that night?

A. I know the circumstances, yes.

Q. You were not there?

A. No, sir, I was not there. I was notified.

Q. Are you testifying to what somebody told you or what you know?

A. I was called on the telephone.

Q. Answer me. Are you testifying to what someone told you or what you knew?

A. What I was told.

Q. You didn't know anything about this gentleman until some time later, did you?

A. About ten minutes after it happened.

Q. How do you know it was ten minutes?

A. They called me at 8 o'clock.

Q. So your statement, on direct examination, that you knew the movement of these two cabooses—you were wrong about that? You didn't have any personal knowledge about it, did you?

A. It is the regular movement every night.

Q. Did you have any personal knowledge as to the movement of these two cabooses that night?

A. No, sir.

Q. If men are going from the oil houses over there, where they fill their lanterns, over to the depot, what route do they take?

A. Any place across the—

Q. What route do they usually take? Straight across to the depot?

A. Any place that they can cross there.

Q. Just answer me; if you are going from one of these [fol. 113] cars, where the oil is kept, across to the depot,

what route do they all usually take across there—straight across?

A. Not all the time.

Q. Isn't it a fact that hundreds of switchmen cross there right along, every week, from day to day?

A. Yes, sir.

Q. And by "path" what do you mean, when you say there wasn't any path?

A. There isn't any path across there.

Q. What do you mean by "path"?

A. A path would be a designated place, wouldn't it?

Q. I am asking you. It was the route they traveled, wasn't it, right along?

A. Well, they traveled all through there, anywhere——

Q. That was the route that they traveled right along, wasn't it?

A. No, not all the time.

Q. When didn't they?

A. At any time. Any men don't take the same path, the same route.

Q. Why, Mr. O'Haire?

A. The men that tie up for their lunch hour——

Q. Many of them eat in the depot, east of the tracks, do they not?

A. West of the tracks?

Q. No, east of the tracks.

A. There is no eating house west of the tracks.

Q. But there is a depot there, and the fellows that carry their lunch eat in there right along, don't they?

A. Some do and some in the restaurant.

Q. And they ran their engines on the spur tracks east of the depot and let them stand in there?

A. Yes, sir.

Q. And the fellows cut right across the tracks, night after night and day after day, to go across there, don't they?

A. Yes, sir.

[fol. 114] Mr. Patterson: That is all.

Mr. McInerney: That is all.

The Court: Recess until 2 o'clock.

Whereupon an adjournment was taken until 2 o'clock, P. M., of this day.

Friday, December 17, 1926—two o'clock, p. m.

Court met pursuant to recess at 2 o'clock P. M.
Present: As before.

JOHN P. O'HAIRE, a witness in behalf of defendant, resumed the stand and further testified as follows:

Cross-examination by Mr. Patterson resumed.

By Mr. Patterson:

Q. Mr. O'Haire, how long has it been since you were the night yardmaster at Kolze yard?

A. Since 1920.

Q. You haven't worked as night yardmaster there in the past six years, have you?

A. No, sir.

Q. Who was night yardmaster at the time that Rock was hurt?

A. George J. Cary.

Q. Your hours of employment end at six o'clock?

A. No, they don't. I have no set hours.

Q. Well, you quit at six o'clock?

A. I have no set hours whatever, but I quit at six o'clock.

Q. What?

A. I quit at six o'clock, but I have no set hours. I am subject to call at any time.

Q. You quit at six o'clock?

A. Yes, sir.

[fol. 115] Q. You don't hang around the yard after six o'clock?

A. No, I generally go home.

Q. In answer to counsel's questions you said these cabooses were to be put on number 2 track, to be stored. You didn't know anything about that, did you, of your own knowledge?

A. Of my own knowledge, no.

Q. Well, you know that you are supposed to testify to what you know, don't you?

A. Well, that is——

Q. Personally; what you personally know. You know that, don't you?

A. Well, it is an every-day occurrence and an every-night occurrence.

Q. How do you know, if you haven't been there for six years in that yard, unless you tell us what somebody else told you?

A. I have supervision of the yard, both day and night.

Q. How do you know what is done there at night in regard to the movement of cabooses when you are not there?

A. From reports from the assistant general yardmaster nights.

Q. When you testify as to what you had seen with your own eyes, in regard to moving cabooses in the night time, you didn't know from seeing it yourself?

A. Not from seeing it, no.

Q. But yet you answered counsel and said you had seen it done.

A. I had during my time as night yardmaster, yes.

Q. But not in the past six years?

[fol. 116] Mr. McInerney: He didn't say he had seen it done in the past six years at all. You didn't hear him say that.

Mr. Patterson: I heard all he said.

Q. How many times at night do you think you have been around that yard in the past six years?

A. Several times, but I couldn't just exactly say what dates.

Q. No, I wouldn't expect you to do that, but how many times do you think you have been there at night and worked or watched them working?

A. Why, that I couldn't answer definitely.

Q. Not very many? Isn't that right?

Q. Oh, yes, I have been there several times night times.

Q. What do you mean by "several"?

A. When I am called there for special duty.

Q. What do you mean by the use of the word "several"? Do you mean two or three, fifty or two hundred?

A. It all depends on how many times I am called.

Q. That is what I am asking about.

A. It all depends on how many times I am called. I am called throughout the night time five or six times a night, out of bed.

Q. To go over to the yard?

A. No, I am called over the telephone for instructions or something.

Q. Please answer the question. Tell me, if you can, about how many times you have been over in the Kolze yard in the past six years, in the night time, and done work there or watched the men work?

A. Well, I can't answer that definitely.

Q. No, but about?

A. I should say about two or three times a year.

[fol. 117] Q. And all the knowledge you have had in the past six years, that you yourself saw as to what was done in that yard, has been obtained directly by you in the two or three times a year that you have been there, isn't that true?

A. Will you repeat that question?

Q. All that you know about what has been done over there—all that you have seen that has been done over there in the night time, has been in the two or three times a year that you have been there at night in the past six years, hasn't it?

Mr. McInerney: It is very elementary that if he wasn't there he didn't see it. He has testified to what he did see.

Mr. Patterson: No, he has not.

Q. Did they testify that that night they took those two cabooses there and put them in on number 2?

A. Yes, sir.

Q. Did you testify to that this morning?

A. I did, yes, sir.

Q. You didn't know that of your own knowledge to be a fact, did you?

A. I was told on the telephone.

Q. Did you know that of your own knowledge?

A. No, I didn't know that of my own knowledge.

Q. You haven't seen caboose movements on that track at night over two or three times a year, if that many, in the past six years, have you?

A. What do you consider night?

Q. At night time, when it is dark?

A. I leave the office between 6:45 and 7 o'clock at night.

Q. Please answer the question. Have you seen this caboose movement that goes in there for 21, isn't it. For a couple of trains—21—have you seen that movement made any time at all in the past six years?

A. Yes, sir, I have.

[fol. 118] Q. How many times.

A. I have seen it made four or five times in the last week—in the last two weeks.

Q. At night time?

A. Yes, sir, I have been on duty.

Q. Before 1924, do you recall a single time that you were ever over there when you were not night yardmaster, when you saw that movement made?

A. Yes, sir, I have.

Q. How many times?

A. Four or five times in the last two weeks.

Q. I am not talking about that. You are not acting as night yardmaster now, are you?

A. No, sir.

Q. You are working over there at night now, aren't you?

A. No, I am working days.

Q. What time do you quit?

A. I have no set time.

Q. You start to work at what time in the morning?

A. Seven o'clock.

Q. And you quit at six?

A. Not all the time.

Q. Those are your regular hours, are they?

A. Those are supposed to be my regular hours, but I am on duty all the time, subject to call all the time.

Q. To come back to the Question, before Rock was hurt in 1924, in the four years before, when you were no longer night yardmaster, you didn't see very much about what went on in that yard at night, did you?

A. No, not very much. Up until the time I left there I could see every movement made.

Q. That was before 1924, wasn't it?

A. No, 1924.

Q. I mean the time you left daily.

A. I don't leave at the same time every day, not once a week.

Q. How long had you known Joe Rock before he was hurt?

A. About fourteen months.

Q. You knew him before that, didn't you?

[fol. 119] A. No, sir.

Q. Are you sure of that?

A. I seen the man going by there, but I didn't know who he was.

Q. You knew he worked over there in the restaurant a long while before he applied for a job, didn't you?

A. No, sir, I didn't.

Q. You knew he worked in the round-house, didn't you?

A. The man told me he did when he applied for a job.

Q. You knew he worked there under the name Joe Rock?

A. That is the nickname he went by. I couldn't say it was his name.

Q. Why do you say "nickname"?

A. That is the only name I knew him by.

Q. That is the only name he was known by in the yard all the time he worked there, Joe Rock?

A. Yes, sir.

Q. When he first came to you for work did you fill out the application for him?

A. No, sir. I do not hire the men.

Q. I know you don't, but just what is your part of the performance, when a man comes in there to apply for work?

A. To send them to the superintendent's office.

Q. Don't you make out some applications there in your office?

A. No, sir.

Q. Are you sure of that?

A. I give them a letter, but no application.

Q. Do you ask them any questions and fill out any form in your office?

A. The only thing I ask him is whether he has ever been employed by the company.

Q. Well, I say, there were no papers filled out there at your office?

A. No, sir.

Q. None at all? The only thing you do is to send a man down with a letter?

A. I give him a letter to the superintendent, yes, sir.

[fol. 120] Q. Have you got a copy of that letter?

A. I don't think I have.

Q. How many letters did you write, either for Joe Rock or John Rock?

A. One.

Q. Is that all?

A. That is all that I know of.

Q. When was that?

A. I couldn't give you the date. Some time in October.

Q. Don't you know that this man came over there—he had been working in the round house—he came over there and made application in the name of Joe Rock?

A. Not to me.

Q. You are certain of that?

A. Yes, sir.

Q. And then, later, he came back to you and made application in the name of John Rock?

A. The only letter I gave him was "John Rock"—J. J. Rock.

Q. Had he ever been to see you as Joe Rock?

A. No, sir.

Q. Are you sure of that?

A. I am pretty positive of it.

Q. Will you say that that is not true; that he never was there to see you as Joe Rock?

A. He asked me one time for the job, when he was working at the round house, when I didn't need a man.

Q. And he asked you as Joe Rock, didn't he?

A. I only know the man as Joe Rock.

Q. You don't recall that, about the first of October, 1923, he came there and you gave him a letter as Joe Rock in regard to his application?

A. No, sir.

Q. But you will not say that that didn't happen, will you?

A. I don't remember.

Q. You will not say then that about 18 days later he came [fol. 121] back and you had been informed that he didn't pass the examination, and he asked you if you would send him down as Joe Rock? You don't remember that?

A. I never was informed that the man was turned down.

Q. You were not?

A. No, sir.

Q. But you remember his coming back and asking you to give him a letter, now, under the name John Rock?

A. No, sir.

Q. You don't remember that?

A. I gave him a letter as John Rock to the superintendent. That is the only letter I ever gave him.

Q. You knew his name was Joe, did you?

—. No, I don't know what his name is at the present time.

Q. Everybody called him Joe?

A. Yes, everybody called him Joe. He is known there to this day as Joe Rock.

Q. He worked in the round-house there as John Rock, didn't he?

A. I don't know what he worked as in the round-house.

Q. Does it ever happen out there, in your long experience, that men will tell you that—will have examinations made of other men than themselves in order to get work?

A. No, sir.

Q. That never happened?

A. No, sir.

Q. You never knew that to happen?

A. No, sir.

Q. Don't you know that there is a number of men who have sought employment there that have done that, and after getting it, continued work and are working there now?

A. Not that I know of.

[fol. 122] Q. Do you know that it is quite a common thing, there and with other railroads—railroad yards—for men to misrepresent their age in order to get work?

A. Why, if they can get by with it, I suppose they do.

Q. You didn't say to John Rock, when he was there the second time—well, you said he wasn't there the second time.

A. The man was there only once to me.

Q. When he was there he talked to you about the job?

A. I couldn't say.

Q. At the time you didn't need any man?

A. I couldn't say. It was some time in October, when he was working at the round-house.

Q. When you filled this letter out as John Rock, you were short of men there, were you not?

A. Yes, sir.

Q. Now, after that is done and the man is examined, isn't it the custom and practice that the references he gives are passed on within thirty or sixty days after the application?

A. Yes, sir.

Q. And that was done in Rock's case, wasn't it?

A. I suppose it was. I don't handle that.

Q. You don't handle that?

A. No, sir.

Q. He came back, any way, and you put him to work?

A. Yes, sir.

Q. As Joe Rock?

A. John Rock.

Q. But you knew he had been called Joe right along?

A. Yes, sir.

Mr. McInerney: He didn't give him that himself. I object to pursuing that examination. John J. Rock is the man that took the assumed name. What have we to do with that?

The Court: The last answer may stand.

[fol. 123] To which ruling of the court defendant, by its counsel, then and there duly excepted.

Mr. Patterson:

Q. Now, Mr. O'Haire, you answered counsel that as to the practice of the Soo Line there, in December, 1924, and before that, when cabooses were moved from the track over east of the depot, down south of Irving Park boulevard and then back over the lead, up into the yard, that there was a man placed on the rear end of the leading car, for main line movement and for public highways.

A. Yes, sir.

Q. What is a lead track?

A. Where the switching is done.

Q. On the lead track?

A. Yes, sir.

Q. And all trains that come into that yard come in over those leads, do they not?

A. Not all of them. Some times——

Q. I don't mean——

A. As a general rule, yes.

Q. They come in there?

A. As a rule, yes.

Q. And those are road trains?

A. Road and transfers.

Q. And by transfers you mean a train brought from some other yard?

A. Other yards for switching.

Q. Other yards for switching, and pulled over there?

A. Yes.

Q. So that lead track is the same as the use of a main line track, isn't it?

A. No, sir.

Q. Those lead tracks were used for trains to pass through there right along, weren't they?

A. Yes, to pass through right along.

Q. Just the same as the so-called main line track is used?

A. No, sir.

Q. Where do the lead tracks connect, if they connect at all, up to the north end of that yard?

A. Number One, Lawrence avenue.

Q. From Irving Park boulevard to Lawrence avenue?

[fol. 124] A. Yes, sir.

Q. Before those two lead tracks come back on to the main, is that right?

A. From Lawrence avenue to Irving Park——

Q. Do the new yard lead and the old yard lead come back to the main line, on Lawrence avenue?

A. Yes, sir.

Q. And it is not an infrequent thing for trains to pull through that way, is it?

A. No; they pull through that way pretty regularly.

Q. And never stop at the yard at all?

A. Oh, yes.

Q. If they have any orders to get?

A. No, through trains pull through the yard.

Q. Never?

A. No, sir.

Q. But they pull through and go on to the mainline at Lawrence avenue, do they not?

A. No, sir, they don't. When a man pulls into the yard he is done; his engine is cut off.

Q. What do you mean by your answer this morning, that there was a man placed on the rear end of the leading car, when counsel asked you to tell what was done with these cabooses, from the time they were picked up until the time they were put over there in the yard?

A. The report given me by the yardmaster.

Q. No; I am not asking you about that. You stated this morning, when you were asked by counsel for defendant to tell us just what was done, in December, 1924, and before that, when cabooses were picked up over there, east of the depot, and brought down south of Irving and then shoved north over the lead track, you said that there was a man placed on the rear end of the leading car for main line movements and for highways?

A. Yes, sir.

[fol. 125] Q. There is a man placed on the caboose to make the movement that I have just described?

A. Yes, sir, for the main line movement; any main line movement or public highway movement, a man is placed on the rear car.

Q. From the time you start with these cabooses, over yonder, east of the depot, and you get down there and throw the cars over, back up the lead and into the switch track, wherever it is going, there is supposed to be a man on the rear of that caboose in the night time?

A. Not after we cross Irving Park boulevard, it is not necessary.

Q. You mean after you get into the switchtracks 1, 2, 3 and 4?

A. That is what I mean, yes, sir. There is not a man on there.

Q. If you are going to kick or shove a caboose into one of the switchtracks, you say you don't need a man?

A. No, sir, we do not.

Q. But until you get to the switchtrack it is customary to have a man on the hind end?

A. No, sir, not after we leave Irving Park boulevard.

Q. Why is it necessary before crossing Irving Park boulevard and not after crossing Irving Park boulevard?

A. Because we are making a switching lead.

Q. Isn't that the same lead track down here? (Indicating on defendant's exhibit 1.)

A. That is all right. We are protecting our cabooses over the public highway.

Q. This is Irving Park boulevard, here (Indicating); here is the new yard lead and here is the old yard lead, (Indicating), and those are known as the same kind of tracks south of Irving as they are north of Irving, aren't they?

[fol. 126] A. Those are running tracks.

Q. The yard limit extends south of Irving Avenue?

A. Yes, it extends to Franklin Park.

Q. How far south of Irving Park boulevard?

A. About a mile and a quarter.

Q. That is all in the yard?

A. Yes, sir, the yard limits.

Q. You say these tracks are called main line tracks until you get to Irving, and beyond Irving they are called lead tracks?

A. Yes, sir.

Q. What are they called south of Irving?

A. A run track or lead.

Q. And it is a running track north of Irving, too?

A. No, sir.

Q. What changes it from a running track south of Irving into a switch track north of Irving?

A. Because the switching is done north of Irving Park boulevard.

Q. And on a good many leads before you hit these tracks?

A. No, sir, not many.

Q. Number One switch is here and cars go over down the two leads? (Indicating on exhibit.)

A. No, sir, number One switch has nothing to do with the cars over down the two leads.

Q. It lets you off of this old yard lead? It is a branch of the old yard lead, isn't it?

A. Number One switch is old yard lead.

Q. And that is now far north of Irving Park boulevard?

A. About 150 feet.

Q. Are you sure about that?

A. Close to that. I wouldn't say exactly. It is close to 150 or 160 feet.

Q. So you would call these tracks lead tracks or running tracks?

A. Yes, sir.

[fol. 127] Q. Now, to come back to my question, why would you have a man on the rear end of the caboose shoving north when you were south of Irving Park boulevard and not need him when you go north?

A. You are protecting the public highway.

Q. Well, but you go on to this lead track a good way south of Irving Park boulevard, with a caboose movement, do you not?

A. No; you come out of a main line.

Q. Where is the cross-over that lets you from the west-bound main to the east-bound main?

A. South of Irving Park boulevard.

Q. How far south?

A. About 200 feet. Close to that. I wouldn't say exactly. It is about 200 feet.

Q. Is it shown on this map, defendant's exhibit 1?

A. No, sir, it is not.

Q. If this is 30 feet to the inch, how far would you say south of the place shown here it is before you come to that cross-over?

A. About to the end of these lines.

Q. You don't see it here?

A. No, the cross-over is not on there. Indicating.

A. And isn't it a fact that that cross-over, from the west-bound main to the east-bound main, is away south of Irving Park boulevard?

A. No, not very far south.

Q. How far do you say?

A. From Irving Park boulevard to the cross-over, I should judge about 300 feet, from the cross-over.

Q. You are quite sure of that?

A. I wouldn't swear to the exact distance, but I should judge about 300 feet.

Q. So when this caboose is picked up, over in here (Indicating on exhibit) somewhere, it is pulled down here (Indicating), down to that cross-over, wherever it is, in [fol. 128] through there (Indicating on exhibit), on to the east-bound main, and up there (Indicating), and into this lead?

A. Yes, sir.

Q. And all that time it was customary and usual to have a man on the hind end of it?

A. Exactly, because you are making a main line movement.

Q. But when you get north of Irving Park boulevard it is not customary?

A. No, sir.

Q. You never saw it done?

A. No, sir.

Q. Isn't it a fact that the road crews sleep in these cabooses right along?

A. Some of them, yes, sir; not all of them.

Q. And isn't it a fact that in handling cabooses the custom and practice is different where the cabooses are live cabooses, going on trains, than it is in handling box-cars?

A. Yes, sir; you handle them a little more carefully than you do an ordinary box-car.

Q. And you handle them differently in regard to lookout and signals, and so on, do you not?

A. Yes, sir.

Q. What difference now?

A. Why, when they are coupled on to the rear end of a train there is a man always placed on there to protect them until we are ready for the cabooses, to put them on.

Q. Suppose you had two live cabooses, so-called, that are not used for a road train; you are shoving them north on that lead; and you go to kick them in down yonder somewhere on one of those switches—those switchtracks—you say it is not customary to have a man on there?

A. No, sir.

Q. To handle the brake on that caboose?

A. It is not necessary, no.

Q. I don't ask whether it is necessary, but wasn't it customary to do it?

[fol. 129] A. No, sir.

Q. What?

A. No, sir.

Q. Just let them go in and hit as hard as they would?

A. Oh, no; they are not going to let them go in and hit them that way.

Q. And the only way they can control that is to have a man on there?

A. No. Why not shove them in with the engine?

Q. I am talking about kicking them in.

A. It is not necessary.

Q. It is customary and usual, isn't it?

A. Oh, no.

Q. But when you are shoving them in there you think there ought to be a man on the rear end?

A. If you are going to couple them on to a train, yes, sir.

Q. What for?

A. So the engineer will know where he is at when he is coming to the rear end of the train.

Q. Not to protect the caboose and the men in it?

A. It is to protect everybody. The man has to make his coupling. He is on the rear end of the car to make the coupling.

Q. If you are kicking those live cabooses in there, you just cut them off on the lead somewhere and let them go into whatever track they may be headed for regardless——

A. They know what track they are putting them on.

Q. Just let them go in there without anybody on them at all?

A. They don't kick them far enough to do any damage. They know what they are doing when handling manned cars.

Q. I ask you if it is customary to kick them off and let them run in there when the switch is lined for a certain switch track; to let them run it and hit as hard as they may?

A. It is not customary to let them run in to hit anything. [fol. 130] Q. Do you say it is not customary and is not the practice there, in kicking those cabooses down that lead, pulling the pin and cutting them loose from the engine—that it is not customary to have a man in there as they get in on the switch track to manipulate the brake or to see about where they go?

A. It is not necessary, no.

Q. Will you answer me, please? Is it customary?

A. No, sir.

Q. Why do you say it is not necessary?

Q. Because the men know where they are putting those cabooses when they are putting them in there and they are looking out for the men that are in the cabooses, and if they are in danger at all they would have a man on there; when they put the cabooses in there, they put them in on the rear end of the track until they are called for.

Q. What switches do they go in, on number 2?

A. I was informed that they go on number 2, yes.

Q. So the only reason you say that they don't do it, is, they don't kick them hard enough to hurt anything?

A. Yes, sir.

Q. You have worked as a conductor, you say?

A. Yes, sir.

Q. Did you ever handle cabooses in the night time, by shoving them ahead of an engine?

A. Yes, sir.

Q. The cabooses that were to be put in on tracks, where they were to be picked up and used on trains?

A. Yes, sir.

Q. You never did anything like having a man on the hind end of a caboose at night?

A. Not when putting them in on a train.

Q. Not when you were going to kick them on a train, you never did that?

A. No, sir, not until the time is ready to put them on.

[fol. 131] Q. Isn't this a fact, Mr. O'Haire; that if you are switching box cars there in that yard—freight cars, where you are giving them a kick by an engine and then pulling the pin, the engine stops and the car goes on; that in handling box cars, some times men ride them in on to the switch leads and some time they do not? Isn't that a fact?

A. They don't ride in at all.

Q. Never?

A. No, sir.

Q. Just let them go in and hit?

A. Yes, sir.

Q. But there is a difference, you say, in handling cabooses—box cars?

A. Why, yes.

Q. What?

A. Yes, there is a difference in handling them.

Redirect examination.

By Mr. McInerney:

Q. What is the difference?

A. They don't handle them as rough as they would handle a box-car.

Q. Why is that?

A. Why, a man handles a caboose a little different because, generally, men stay in the cabooses, but a box-car is kicked right in on the track the same as the cabooses are kicked in on the track, but they are not kicked in as hard as a box-car.

Q. They exercise more care in the manner of kicking?

A. That is it exactly.

Q. You testified in reference to the custom in handling cabooses while you were at the Kolze yard, similarly to handling the one we are talking about. You had in mind what you had seen there in the day-time and in the night-time, did you?

A. Yes, sir.

Q. The only difference between a man on a leading car is that in the day-time he hasn't got a light——

Mr. Patterson: Let the witness answer.

Mr. McInerney:

Q. If a man handles the leading car in the day time, what [fol. 132] more has he at night than in the day-time?

A. A lantern.

Q. The rule is the same except for a lantern?

A. Yes, that is right.

Recross-examination.

By Mr. Patterson:

Q. This man that always rides cars on Irving Park boulevard, when a car is shoved north, where is he supposed to go when he gets to Irving Park boulevard?

A. The foreman gives the cut-off signal and he is supposed to go get the engine.

Q. Suppose he doesn't get the cut-off signal.

A. If he doesn't get the cut-off signal, when he gets where the cabooses are he will drop right at the foot-board of the engine.

Mr. Patterson: That is all.
Mr. McInerney: That is all.

Mr. Patterson: At this time, your Honor, on behalf of the plaintiff I make a motion to strike out all of the testimony of the witness, John P. O'Haire, as to custom and practice in handling cabooses in the Kolze yard of the defendant company, on the ground that it now appears that the witness had not been to those yards at night time for four years before the accident, except, possibly, three or four times a year, and that it is based on hearsay, and that the jury be instructed to disregard such parts of it as are based on hearsay and not what the witness knows.

The Court: The jury heard the evidence and they are the judges of the credit and weight to be given to the evidence of each and every witness. They will give the testimony of the witness in this regard such weight as they think it is entitled to. The motion will be denied.

[fol. 133] To which ruling of the court plaintiff, by his counsel, then and there duly excepted.

Ernest Rodgers, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McInerney:

Q. Give your full name, please?
A. Ernest Rodgers.
Q. Where do you live?
A. Phillips, Wisconsin.
Q. What do you do?
A. Electrician for the Soo Line at Fond du Lac.
Q. How long have you been connected with the Soo Line?
A. Since June, 1918.
Q. What was your business before that?

A. I was with Nielan-McClurg Lumber Company, in practically the same line of work.

Q. Electrician?

A. Yes, sir.

Q. Where are you, in the shops?

A. In the round-house.

Q. What are your duties?

A. My duties are to maintain and inspect the headlight equipment on the locomotives and the running repairs as they come into the round-house.

Q. Has engine 2446 been in your jurisdiction?

A. Yes, sir, it has, all the time.

Q. Can you tell me the kind of a headlight that engine had on the night of December 31, 1924?

A. The body of the cage—was a cage round top, with two numbered lights and a reflector. It was a standard reflector, 9 inches deep and 18 inches in diameter.

Q. The reflector?

A. Yes, sir; that is the main part of it. The cage has nothing to do with it.

Q. Where is the reflector located, in the back?

[fol. 134] A. In the cage, with the glass in front of it.

Q. What kind of a bulb is in there?

A. A 250 watt bulb, 200 candle power.

Q. Two hundred candle power?

A. Yes, sir.

Q. Where is that operated? Where do they get the "juice" for that?

A. The generator on top of the engine, a steam turbine.

Q. Is there a place for the engineer to test whether he has "juice" there?

A. It will quickly show if he hasn't when he opens and closes the switch.

Q. How will it show?

A. By spitting fire—a flash.

Q. When it has "juice" it flashes?

A. Yes, sir.

Q. When it hasn't he gets no flash? Is that right?

A. Yes, sir.

Q. Is there a contrivance on that headlight to dim the lights?

A. There is.

Q. How is that accomplished?

A. That is cut in on the switch, on the other side—cut in on that resistance, which cuts the big bulb down to about one-fourth.

Q. It is the same bulb?

A. It is the same bulb, but the switch is thrown over the other way and turns the current there on dimmer into the headlight.

Q. How far do the rays of that headlight go from the engine when the lights are high?

A. It depends on the man. A man used to riding back of that light and looking ahead, he can see more than one not used to it, but the law calls for 800 feet.

Q. They will throw that far?

A. Yes, sir, they will throw that far. I have read newspaper print farther than that.

[fol. 135] Mr. Patterson: I object to that.

Mr. McInerney:

Q. This particular type we are talking about; how far from the engine, or from the headlight, when the bright lights are on—how far does that extend before it touches the ground?

A. Every type——

Mr. Patterson: I object to that, unless we are talking about this engine, on this night.

Mr. McInerney:

Q. Well, is the headlight on this engine in the same position it is on every other engine?

A. It is in the same position. It has got to be the same.

Q. Have you conducted tests on those headlights?

A. Yes, sir. You have to right along to see whether they line up right with the track; sideways or vertically.

Mr. McInerney: What is your Honor's ruling?

The Court: There is no ruling. The question was asked and answered and you asked succeeding questions. There is nothing for the court to rule on.

Mr. McInerney:

Q. How far are those rays before they touch the ground?

A. To a man the average height—he has to be away

125 feet before the main beam will strike him in the face.

Q. How far do those rays go on either side of the rails?

A. When it is properly focused the main beam will not throw on either side of the rail any distance at all.

Q. What light is there between that 125 feet and the engine itself?

A. There are really two distinct colors of light beside the main ray. There is one, a little brighter, that will strike the track probably 50 or 60 feet from the engine—from the headlight; and then, beyond that, there is another light that will be about like—pretty near like sun-down, when the [fol. 136] sun is just about setting—a red glow—that will strike the track about seven feet from the nose of the pilot, and, of course, spread a little on each side.

Q. Have you looked at that light from the distances just described, from 75 to 50 feet and 7 feet from the engine—have you looked into a headlight such as this from that distance?

A. I have, yes, lots of times.

Q. What effect does that have on your vision?

Mr. Patterson: I object to that.

A. It doesn't bother me any.

The Court: Objection sustained.

Mr. Patterson: I move to strike out the answer.

The Court: Strike it out.

To which ruling of the court defendant, by its counsel, then and there duly excepted.

Mr. McInerney:

Q. How far, east and west of the rails, does the light extend, beginning at the pilot of the engine?

A. That I couldn't say. I have never had occasion to measure it.

Q. You have no way of telling that?

A. No. I have never had occasion to measure how far—the diffused light, you mean?

Q. What is that?

A. The diffused light you mean? I have never had occasion to measure it.

Cross-examination.

By Mr. Patterson:

Q. Mr. Rodgers, you have this main beam or the main ray, that is for distance, isn't it? Is that right?

A. What is that?

Q. (Pending question read.)

A. You will have to speak a little louder. Sometimes I am bothered in hearing a little.

[fol. 137] Q. The main ray or the main beam, as you call it, is the one that carries farthest?

A. Yes, sir.

Q. That is up a little ways?

A. Yes, sir.

Q. And below it you have this other ray?

A. Yes, sir.

Q. That will hit more than 50 feet——

A. Fifty or 60 feet. I couldn't say.

Q. And you have another that will hit the ground, about seven feet beyond?

A. Yes, about that.

Q. All these questions that you have been asked, as to illumination by one of these headlights will depend on the kind of night it is and the condition the engine light is in, will it not?

A. I suppose so. I couldn't say, because I haven't been back of them to tell.

Q. You haven't been out in the night time and looked into them at all?

A. I don't ride the engines, so I couldn't say how they looked ahead.

Q. You haven't been out in the night time and looked into them as they came towards you?

A. Occasionally, around the round-house, yes, but at this particular time I never paid attention to them.

Q. You know a bright headlight, if you are facing it in the night time, will blind or dazzle you?

A. No, not me.

Q. Pardon me. You have an affliction of your eyes? One eye gone?

A. Yes, sir.

Q. You are speaking of yourself only?

A. Of myself only.

Q. You think you can stand and look into the bright headlight, with full power, from 50 to 150 feet away from it, [fol. 138] and it would not affect your eyesight at all?

A. It would not bother me at all. I do it right along.

Q. You do it right along?

A. Yes.

Q. Do you think you can see through a headlight and see something coming from behind it?

A. No, I don't think I could. I know what I could do. I don't know what anyone else could do.

Q. You know you couldn't see objects coming from behind it until you got out from it, don't you?

A. I don't know what anyone else can see.

Q. When did you see Engine 2446 first after December 31, 1924.

A. Well, I couldn't say—I couldn't remember. I never kept any records of that stuff and I couldn't remember when it came back from Kolze.

Q. Can you remember anything about that particular engine at all?

A. When it come back, yes. I know the condition when it did come back. Just what date, I don't know, but when it come back the headlight was O. K.

Q. How do you know that?

A. Because they come to me when they come back from out on the road anywhere, and when they come to the round house, it is up to me to inspect them, to see that they are ready to go again.

Q. Do you keep records about these different engines?

A. When the work is reported. It is reported on book in the roundhouse. I don't keep records of it myself.

Q. You have no independent record at all?

A. No, not of my own.

Q. And no record of this particular engine?

A. No more than any of the rest of them. I know it couldn't go in and go out without my inspecting it, because that is my duty, and I catch them all as they come in.

[fol. 139] Q. Do you know when it was inspected last, before this accident, December 31, 1924.

A. Well, it was down at Kolze a long time. How long it was there I don't know. Of course, I didn't inspect it there.

Mr. Patterson: That is all.
Mr. McInerney: That is all.

Joseph Brozny, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Q. Give us your full name, please?
A. Joseph Brozny.
Q. Where do you live, Joe?
A. Franklin Park, Illinois.
Q. What do you do for a living?
A. Car man, working on a rip track, car shop.
Q. You are working on the rip track of the Kolze Yard, of the Soo Line?
A. Yes, sir.
Q. A rip track is a repair track?
A. Yes, sir.
Q. You are a car repairer?
A. A car repairer and carpenter. I do mostly carpenter work.
Q. How long have you been working for the Soo Line?
A. The second time, five years.
Q. The last five years?
A. Yes, sir.
Q. You were working there December 31, 1924, were you?
A. Yes, sir.
Q. The night when Joe Rock was injured?
A. Yes, sir.
Q. Where were you that night?
A. I was on the job. I was walking from the depot to the shanty.
[fol. 140] Q. You were working where?
A. No, I was walking.
Q. Walking from the depot to where?
A. To the third shanty where we used to have our tools and lanterns and everything.

Q. There are old cars there?

A. Yes, sir.

Q. They are shown here? (Indicating defendant's Exhibit 1.) Look at this and see if you can tell here where it was.

A. Yes, sir.

Q. You were walking from the depot over these places shown here as car bodies?

A. Yes, sir.

Q. What were you doing over here? (Indicating on defendant's Exhibit 1.)

A. Well, I was going back again to wait for trains.

Q. There was no more for you to do until some other train came in, is that right?

A. Yes, sir.

Q. Where were you walking, Joe? Just opposite the depot?

Mr. Patterson: Suppose you let Joe tell.

Mr. McInerney:

Q. I want to help him all I can. Tell us where you walked.

A. Straight from the depot, across them tracks, to the shanty.

Q. Look at this map and tell me where you walked. This is No. 1 switch. (Indicating on defendant's Exhibit 1.) Do you see it? That is No. 2. (Indicating.) Where did you walk with reference to those?

A. Here (indicating on said exhibits), and I stopped here. (Indicating.)

Mr. Patterson: Just a minute. Indicating——

Mr. McInerney:

Q. You walked over about to the frog, between No. 1 and [fol. 141] No. 2 switch, did you?

A. Yes, sir.

Q. And you came over on the new yard lead, the track?

A. Yes, sir.

Q. And stood about at that crossing?

A. Yes, sir.

Q. What did you do there, Joe?

A. I simply seen that fellow coming and I throw that switch for him.

Q. Which switch did you throw for him?

A. That is No. 1 here. (Indicating on defendant's exhibit.) I was up there. (Indicating.)

Q. Were you over here? (Indicating.)

A. Yes, sir.

Q. Tell what switch you threw?

A. Number 1 switch.

Q. When you looked up at the belt line train approaching, where was it? How far was it from the switch?

A. Well, about 50 foot.

Q. Did you look straight at it?

A. I looked straight at it.

Q. Can you remember anything about the headlight?

A. Well, the light I couldn't remember very much, because it is two years, almost.

Q. But you did stand right alongside of the track and throw the switch?

A. Yes, sir.

Q. And then what did you do?

A. Well, after I throw the switch over I seen two cabooses is coming and I seen a fellow around the cabooses.

Q. Wait, you saw what coming—two cabooses?

A. Two cabooses coming.

Q. Where were they?

A. They were near the front of the depot.

Q. Where was the rear end of the caboose with reference to the front of the belt engine?

A. The rear end was ahead of the belt engine.

[fol. 142] Q. How much ahead of the belt engine?

A. About ten or fifteen foot; about; I couldn't tell exactly.

Q. How fast was the Belt engine going?

A. Oh, about five or six miles an hour.

Q. How fast were the cabooses going?

A. About the same.

Q. Did you see Joe Rock that night?

A. I seen a man, but I didn't know who was it.

Q. What did you see?

A. I seen that fellow, that I thought was a man from that caboose, that crew. I seen him near the caboose, at

the time he passed the track and as far as the caboose, and the caboose knocked him down.

Q. Where was he when you saw him?

A. He was maybe ten feet from the caboose, or five or ten foot.

Q. Where was he, between the tracks or where?

A. He was between the tracks.

Mr. Patterson: He said he was five or ten feet from the couplers, I understand.

Mr. McInerney: He said "cabooses."

The Court: What did you say, couplers or cabooses?

The Witness: Cabooses.

Mr. McInerney:

Q. Was that the first time you saw the man, Joe?

A. Yes, sir.

Q. He was ten feet in front of the cabooses when you first saw him?

A. About 10 feet.

Q. What was he doing?

A. He was trying to pass the track.

Q. What was he doing, standing still?

A. No; he was walking.

Q. He was doing what?

A. He was going.

[fol. 143] Q. Did he have anything in his hand?

A. A lantern.

Q. At the time he was ten feet in front of the cabooses where was the belt line engine?

A. Oh, about ten feet—I don't know.

Q. From where?

A. Well, coming.

Q. How close was it to the cabooses at that time?

A. Oh, about 20 feet.

Mr. McInerney: That is all. Cross-examine.

Cross-examination by Mr. Patterson:

Q. Your job was that of a car repairer, wasn't it?

A. Yes, sir.

Q. Did you ever throw switches out there before?

A. No.

Q. How did you happen to throw that switch that night?

A. Well, we generally—if I work there and I seen a train coming and I know the crew and everything, I just help them, so they don't have to jump off of the engine.

Q. Did you ever throw a switch to let a train in at any time in your life, without being told to do so?

A. I didn't throw any switches, but——

Q. You were not supposed to throw switches at all, were you?

A. I seen the other fellows doing it and I done it, too.

Q. Do you mean to say, when you saw a train coming up there that you go and throw a switch to control the movement of that train without somebody telling you where it is going?

A. Well, if I don't know, I won't throw it.

[fol. 144] Q. You didn't talk to anyone in that crew, did you?

A. I worked there long enough so I know all the movements.

Q. You knew what?

A. Which track it should come on.

Q. What track was that supposed to go on?

A. Well, it was supposed to go on track 17.

Q. How did you know that?

A. I was working on the trains.

Q. You didn't know that either before you threw the switch, did you?

A. Well, I seen the switchman standing and he was going to jump off, and I throw that for him, so he don't have to jump off.

Q. When you saw that coming, you didn't know which track it was going in, did you?

A. I know I wouldn't throw that switch—if I throw the switch and I don't know the track, he would stop his train.

(The foregoing answer was read.)

The Court: Is that what you said?

The Witness: Yes.

Mr. Patterson:

Q. Where is the rip track, where you do your car repairing?

A. I don't see no rip track around here. (Indicating on defendant's Exhibit 1.)

Q. Where is that—without looking at the map—where is that rip track supposed to be that you worked on?

A. North from the depot.

Q. How far north?

A. Oh, about——

Q. Is it beside the main lines?

A. The other side of the main lines.

Q. Which side of the main lines?

A. That extends to the north, right beside the main line.

Q. How far north of the depot do you come to the rip track?

A. From the depot?

[fol. 145] Q. Yes.

A. To the rip track?

Q. Yes.

A. Well, just about a block and a half.

Q. Away up north from the depot, isn't it? Away north of this depot here? (Indicating on defendant's Exhibit 1.)

A. Yes.

Q. A block and a half over on the other side of the main line, the east side?

A. Yes, sir.

Q. Who was working with you that night?

A. I was working with the Inspector.

Q. What was the last work that you did before you walked down there?

A. I just was watching the trains coming from the north.

Q. Had you repaired any cars that night?

A. No, we had repaired cars afterwards, but I was watching a passenger train coming from the north; had to oil the boxes and see about the brakes and everything, to see if it was in good condition to run farther up.

Q. What is the last work you did before you went down there and threw that switch?

A. I don't remember.

Q. What?

A. I don't remember what was the last work.

Q. Had you been working up on the rip track?

A. Yes, I had been working up on the rip track.

Q. And if you worked again you would go back up there to do your work on the rip track?

A. I was inspecting at the time, during the time a man was laying off sick. I was working in his place. I didn't have to go on the rip track then because I was working in the yard.

Q. The yard is away up north of Irving Park Boulevard, isn't it?

A. From Irving Park Boulevard to Lawrence Avenue.

Q. Did you ever throw a switch for a train coming into that yard before?

A. Yes, I did.

[fol. 146] Q. When?

A. I don't remember. I never paid no attention to that.

Q. You are not supposed to do anything like that at all, are you, Joe? That is not your job at all, is it?

A. It wasn't mine.

Q. You throw those switches?

A. I done it for a favor.

Q. Did anybody ask you to do it?

A. Sometimes when they are busy.

Q. No, this time, did anybody ask you to do it?

A. No.

Q. I didn't get this clearly in mind; where did you stand in order to throw that number 1 switch, on which side of the track?

A. Here (Indicating on defendant's Exhibit 1).

Q. You stood between the old yard lead and the new yard lead, did you?

A. Yes, sir.

Q. And you got ahold of this number 1 switch?

A. Yes, sir.

Q. Isn't that always kept lined up for the lead?

A. No, that is not kept lined for it.

Q. Now, this old yard lead runs along there and north of it are a lot of switch tracks?

A. Yes, sir.

Q. This train was to go down to the old yard lead, to go into 27 or 17, some place down there?

A. Yes, sir, 17.

Q. Will you say that you had to throw that switch number 1?

A. I don't have to, but I did for a favor.

Q. Wasn't that switch closed?

A. No.

Q. Isn't it a fact that whenever there is not a cut to go into that number 1, 2 or 3, that all of those switches are lined so the train will go down the lead instead of the switch track?

[fol. 147] A. No, they have to line them themselves.

Q. Every time?

A. They have to line them themselves.

Q. The lead, when they are not kicking in on it—on different tracks, isn't kept lined all those times?

A. No.

Q. Are you sure about that?

A. I wasn't working on that job, so I don't know.

Q. When you threw that, this engine was how far away from you?

A. Oh, about 50 feet.

Q. Had it crossed Irving Park Boulevard?

A. Yes, it had crossed there.

Q. North of Irving Park Boulevard?

A. Yes, sir.

Q. Where were you going?

A. I had my intention of going back to the shanties.

Q. What for?

A. Well, to stay there, to wait for work coming.

Q. And then, when you saw the engine first, 50 feet away, you didn't see the caboose yet at all, did you?

A. No.

Q. The caboose came later?

A. Not very much later, but a little.

Q. The caboose was south of the engine when you saw the engine?

A. I don't know how far. I never looked.

Q. The engine kept on coming towards you, and then these cabooses came out *passed* the engine? Isn't that right?

A. Yes, sir.

Q. Did you see the cabooses before they got on to you?

A. I seen the cabooses coming.

Q. On what track were they?

A. I don't reemember.

Q. What track was that train on?

A. The Belt?

Q. Yes.

A. That was on the lead.

Q. Which lead?

A. The one I showed you.

Q. Which lead?

A. I don't know what they call it, number 1 or what.

[fol. 148] Q. Did you leave the car shanty over here? This is the ice house? (Indicating on defendant's exhibit 1.)

A. Yes, sir.

Q. And that is the new yard lead and there is the old yard lead. (Indicating on said exhibit.)

A. Yes, sir.

Q. Which track was the train on?

A. The train was on this track.

Q. The train was on the old yard lead?

A. I don't know exactly. I wouldn't swear to that.

Q. You swore a minute ago that you threw number 1 switch, didn't you?

A. Yes, I throw number 1 switch.

Q. And number 1 switch is on the old yard lead, isn't it?

A. Well, it must be, I don't know.

Q. Don't you know that that train came in over the new yard lead and number 1 switch does not touch the new yard lead at all?

A. That was number 1, I think.

Q. You don't know much about this, do you, Joe? You don't know much about what happened there?

A. I was working there.

Q. Do you re-mber what happened there that night?

A. Yes, I remember

Q. You say the train was on this first track?

A. No, I said when I throwed the switch the first time.

Q. Number 1 switch?

A. Yes, sir.

Q. Now, what do you say? Did you throw it?
A. I throwed it.
Q. Was the train on that track?
A. Yes, there was a train on that track.

[fol. 149] Re-direct examination.

By Mr. McInerney:

Q. How many cars were on the belt run that night?
A. I couldn't tell you that.
Q. You didn't notice it after it went by you?
A. No.
Q. Did it stop after it went by you?
A. Yes, it stopped.
Q. Did the cabooses stop?
A. Yes, sir.
Q. Where were you then?
A. I turned back and went to the yard, because I don't like to look at the accident, that is all.
Q. Were you in between the two tracks when they both stopped?
A. Yes, sir.
Q. The cabooses were to one side and the belt run on the other?
A. Yes, sir.
Q. Did you see anybody on the belt run engine as it approached that switch?
A. That was O'Connor.
Q. What?
A. That was Jerry O'Connor. He was standing on the footboard.
Q. Is he the man you threw the switch for?
A. I seen him.

Recross-examination.

By Mr. Patterson:

Q. And you threw a switch on the number 1 switch—on the old yard lead, for a train that was coming in over the new yard lead? That is your testimony, isn't it?
A. Well, I can get that plainer when I got to the yard.

Redirect-examination.

By Mr. McInerney:

Q. What did you say? You can get it plainer after you get to the yard?

A. Yes, sir.

Q. You don't understand that map? (Indicating defendant's exhibit 1.)

A. No.

[fol. 150] Q. When you threw the switch the belt line engine went over it?

A. No.

Q. What happened?

A. It stopped.

Q. When it stopped, it stopped about even with the cabooses, didn't it?

A. About, yes.

Mr. McInerney: That is all.

George Ourada, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McInerney:

Q. What is your name?

A. George Ourada.

Q. Where do you live?

A. Schiller Park.

Q. What is your business?

A. Locomotive engineer.

Q. By whom are you employed?

A. By the Minneapolis, St. Paul & Sault Ste. Marie Railway.

Q. How long have you been a locomotive engineer?

A. Since 1913, September 15.

Q. For the Soo?

A. Yes.

Q. Where have you been working?

A. Right at the Soo Yards, Schiller Park.

Q. What did you do before that?

A. I fired a locomotive.

Q. Where?

A. The Wisconsin Central—up to 1910, from 1909, January 9.

Q. You were on the Wisconsin Central prior to January, 1909?

A. Yes, sir. I hired out on the W. C.

Q. How long ago?

A. About 18 years ago.

Q. You have been in the Kolze yard how long?

A. Since 1909—January 9.

[fol. 151] Q. These same yards where this accident occurred?

A. Yes, sir.

Q. Either firing or running an engine?

A. Yes, sir.

Q. What time of the day or night did you work there, different hours?

A. Since the eight-hour move I worked from 3 to 11 at night.

Q. How long is that?

A. 1916.

Q. You worked from 3 to 11 at night from 1916 on every day that you worked?

A. Yes, sir.

Q. What did you do in the yards—run a switch engine?

A. Yes, sir.

Q. Generally, what did you do in the yard on your switch engine?

A. Switched cars, breaking up trains and making up trains.

Q. Did you have anything to do with cabooses?

A. Occasionally I did.

Q. How often did that occur?

A. Well, on this particular job, every day.

Q. Every day between 3 and 11 o'clock?

A. Yes, sir.

Q. What would be your movement with reference to cabooses? What would you do with them?

A. Put them—after the train was made up they called for the caboose. We put the cabooses onto the train to couple them up.

Q. Did you handle any cabooses before the train was made up?

A. Yes, sir.

Q. What would be your movement there?

A. Get them off of the caboose track, what they called the caboose track, and take them over into the yard, to have them ready whenver they are called for, so they are ready —lines up.

[fol. 152] Q. There are two tracks, one for hooking them onto the train and the other for taking them to the switch track to let them stay there until they ask for them?

A. Yes, sir.

Q. Then what do you do?

A. We go up against them and shove them in. They are all lined up.

Q. When the train is ready?

A. When the train is ready they call for the cabooses; from the south end of the yard we go up against the cabooses; bring them up, either clear them or put them on the opposite track for the next train.

Q. The caboose track you refer to is shown on this map at the track east of the depot? (Indicating defendant's exhibit 1.)

A. Yes, sir.

Q. On December 31, 1924—did you have a couple of cabooses that night?

A. Yes, sir.

Q. What were you doing with them?

A. We got the cabooses off of the caboose track; crossed over the north bound main to the south bound main.

Q. How did you get the cabooses? Did you back in your engine?

A. Backed in back of the depot.

Q. You backed in your engine to this caboose track?

A. Yes, sir.

Q. Hooked on the two cabooses?

A. Yes, sir.

Q. Then what did you do?

A. We headed out from Irving Park Boulevard over the north bound main to the south bound main, and then we shoved the cabooses through the crossover, what they call the old lead, and when I backed onto the old lead with the engine, which brings it about Irving Park Boulevard, I stopped and gave the head man a chance to line the switch back with the light set green. I looked back—

Q. When your engine got about to the north line of Irving [fol. 153] Park Boulevard, you stopped?

A. Yes, sir.

Q. You were then on what track?

A. The old lead.

Q. On the old lead, which shows as the second track from the ice house track, the third?

A. One, two, three—the third track, meaning the ice house track.

Q. You stopped there for what purpose?

A. To give the man a chance to line—

Q. What man?

A. The head man.

Q. Who was he?

A. Jack Fitzgerald.

Q. What did he do?

A. He lined the switch back.

Q. What switch?

A. The lead switch—the crossover.

Q. Show it to me here. (Indicating defendant's exhibit 1.) Where is it?

A. He went and fixed that.

Q. And you stopped there, and then what happened?

A. I looked back and I got a sign from the conductor to kick them.

Q. Who is the conductor?

A. Otis Hudson.

Q. Where was he standing?

A. In between switch track number 1 and number 2, practically closer to number 2 switch.

Q. Between number 1 and number 2 switch?

A. Yes, sir.

Q. What signal did he give you?

A. A kick signal.

Q. What did that mean to you?

A. To kick the cars, or to pass them on.

Q. Where were those cabooses going?

A. Why I couldn't just say. Always on one, two, or three. They were making-up tracks.

[fol. 154] Q. On this particular night they were going where?

A. I believe on number two.

Q. Had you started from Irving Park Boulevard at that time?

A. I had just started.

Q. At that time did you see the Belt run?

A. Yes, sir.

Q. Where was the engine as you were stopped at Irving Park Boulevard? Where was the belt engine?

A. North of Irving Park boulevard. He had already crossed.

Q. How far north was he ahead of his engine when you were standing there?

A. About 150 or 175 feet.

Q. Where was it with reference to the rear caboose that you were pushing?

A. With reference to the rear caboose?

Q. Where was the belt engine with reference to the back of the last caboose that you were pushing?

A. Just a little ahead, about 100 feet or 75 feet ahead of that caboose, the rear caboose.

Q. How fast was he going?

Mr. Patterson: Who?

Mr. McInerney: The belt run.

A. About four or five miles an hour.

Q. Hudson was out there with his lantern, was he?

A. Yes, sir.

Q. And he signaled you for a kick?

A. Yes, sir.

Q. Then what happened? By the way, who else was on that run with you besides Fitzgerald?

A. Harry Cutler.

Q. What was his job?

A. He was on the back end of the tender, ready to pull the pin on the cabooses and let them go.

Q. Was he going to cut the two of them?

[fol. 155] A. Yes, sir.

Q. And Hudson was at the switch?

A. At about number 2 switch.

Q. Then what happened?

A. When I see the kicks going, I see that my man—that is what we call the head man following the engine—was on the front end of the engine, on the footboard. I just about started to kick the cabooses when he reversed the signal into a washout, a stop sign, and I took it. I went to work and applied the emergency brake, threw her ahead and put the sand on.

Q. How far had you progressed before you got the signal to stop?

A. Why, not very far. About 15 feet.

Q. Where was the belt run engine when you stopped, with reference to the end of your caboose?

A. About opposite—just in between the two cabooses.

Q. You had caught up to him by that time?

A. Yes, sir.

Q. Now, do you know what the custom or practice in the Soo Line Yards is in movements of the kinds you carried on that night with these two cabooses?

A. Yes, sir.

Q. State whether or not there is a man on the leading car at night with a light in his hand. What is the custom as to that?

A. Any time there is cars shoved or pulled over a public highway or any crossing there is a man on the leading car with a lantern.

Q. Did you notice the headlight on the belt run?

A. Yes, sir.

Q. Where was it when you noticed it? Where was the engine when you noticed it?

A. First he was crossing from the incoming lead onto the new lead, just south of the crossover where I come out at. [fol. 156] Q. Is that the first time you say that?

A. Yes, sir.

Q. What was the condition of the headlight then?

A. Dim.

Q. Did you see it again?

A. Yes, sir.

Q. When did you see it again?

A. After we stopped; after this accident.

Q. What was the condition of it then?
A. The same thing.

Cross-examination.

By Mr. Patterson:

Q. Do you remember talking to a man named C. J. Ray, on the 8th of January, 1926, at your home?
A. There was a man up there on that date.
Q. Do you remember that?
A. Yes, sir.
Q. A man named Ray?
A. A man there who introduced himself as Mr. Patterson.
Q. He told you that he was from Mr. Patterson's office, didn't he?
A. No, sir, he handed me a card.
Q. And he told you he was from my office?
A. No, sir.
Q. Did you talk to him that day about how Rock got hurt?
A. Yes, sir, I did.
Q. Did you tell him what you knew about it?
A. No, sir.
Q. Why didn't you?
A. Because I didn't think it was my place.
Q. Why?
A. Because I didn't figure it was my place to tell a man anything outside of the court.
Q. You told the company people what you knew about it, didn't you?
A. Yes, sir.
[fol. 157] Q. But you didn't think it was your place to tell Rock's attorney or his representative anything about it?
A. No, sir.
Q. Did you tell him anything about how the accident happened that day?
A. No, sir.
Q. Isn't it a fact that he sat down there and wrote about two and one-half pages while he was talking to you?
A. No, sir.
Q. He didn't do that?
A. No, sir.

Q. Didn't you tell him at that time and at that place that you didn't know what was the condition of the headlight on the belt train engine, whether dim or bright, "as I didn't notice or see it"?

A. If I told him that, I told him that because I didn't want to tell him.

Q. If you told him that you told him a lie; is that it?

A. I won't say it was a lie. I simply didn't want to have anything to do with him.

Q. Did you tell him that?

A. I couldn't recall it.

Q. You told him, in the first place, that you didn't want to talk to him, because you didn't have any time?

A. Yes, sir.

Q. And you hurried away to work, although you knew that you were not due to work for over an hour from the time you talked to him, didn't you?

A. No, sir. A man calls for me at that time, about 2:30, if I am ready to go with him; if I ain't, I walk.

Q. Will you say that, at that time and place, you did not tell Ray that you did not, on the night Rock was hurt, pay any attention to the belt train headlight?

A. I couldn't recall it.

Q. You may have told him that?

[fol. 158] A. I couldn't tell you.

Q. You recall the occurrence, do you not?

A. Yes, sir.

Q. Do you mean you can't remember it or you don't know?

A. Well, I didn't want to do it. I don't remember it, because I didn't pay much attention to it, and I didn't have such time and I never gave it the slightest thought, to get into a conversation with anybody.

Q. If you did tell him that, was it true or false?

A. I didn't get that.

Q. If you did tell Ray at that time and that place that you didn't see the headlight on the belt train, as to whether it was dim or bright—if you did say that to him was that the truth or was it not the truth?

Mr. McInerney: I object to that.

The Court: He may answer.

To which ruling of the court defendant by its counsel, then and there duly excepted.

A. Not the truth.

(A short recess was then taken.)

Mr. Patterson: Q. Did you have any reason for telling Mr. Ray, when he came there on behalf of Rock, something that wasn't true?

Mr. McInerney: If the court please, it has not been shown yet that he told this to Mr. Ray. He asked him a question and he said he couldn't recall.

The Court: The question is if he had any reason.

Mr. McInerney: The assumption is that he said it.

The Court: I don't want to argue that. He may answer the question.

To which ruling of the court defendant by its counsel, then and there duly excepted.

Q. (The pending question was read.)

[fol. 159] A. If I did I done that just to get rid of him.

Mr. Patterson:

Q. That is the only reason?

A. Yes, sir.

Q. Now, if I understand you correctly, Hudson was up north with you somewhere—he was the conductor?

A. Yes, sir.

Q. And Cutter, is it, or Cutler?

A. Cutler.

Q. Was he the head man?

A. The field man.

Q. He is supposed to do the pin-pulling on a kicking job like that?

A. It all depends on where they are at.

Q. Was that Cutler's job or was it the head man's, Fitzgerald's job?

A. It all depends on who is closest to the cars.

Q. Was your engine headed north?

A. South.

Q. And was backing north?

A. South.

Q. And was backing north?

A. Yes.

Q. And the cabooses were behind your tender?

A. Yes, sir.

Q. And it was in between that caboose and your tender that this man, Cutler, rode?

A. No.

Q. Where?

A. He rode the leading caboose over Irving Park boulevard.

Q. He did?

A. Yes, sir. That is the first caboose north.

Q. How did you know that?

A. Because I got him two car lengths away from him.

Q. How do you know it?

A. Because I seen him.

Q. You saw him on the caboose?

A. Yes, sir, on the side of the platform.

Q. How far did he ride there?

A. Irving Park boulevard.

Q. How far north of Irving Park boulevard did he ride?

A. North like—I couldn't just say exactly, but a foot or so, to just over Irving Park.

[fol. 160] Q. And then he dropped off?

A. Yes, sir.

Q. He rode the hind end of the caboose and dropped off and came back and got on the foot-board at the rear of your tender?

A. Yes, sir.

Q. You were moving along all that time?

A. No, sir.

Q. You were not?

A. No, sir, I was not. When he—when he drops out that brings the rear end of the tender just about where he stood when I stopped for the switch.

Q. When you stopped for that switch you were south of Irving Park boulevard?

A. No. The engine was just on Irving Park boulevard, about.

Q. Which switch did you stop for?

A. This one right here. (Indicating on defendant's exhibit 1.)

Q. That is south of Irving Park boulevard, is it?

A. Just exactly south of Irving Park boulevard.

Q. About ten feet?

A. No. I wouldn't say. I never measured it.

Q. And you stopped your engine, with both cabooses, north of it, and everything stood south of that switch south of Irving Park boulevard?

A. Everything stood north.

Q. North?

A. The engine was right here and the cabooses right here. (Indicating on defendant's exhibit 1.)

Q. How did you get over that switch?

A. I came right over here, passed over. (Indicating on said exhibit 1.)

Q. Over here, on the main line, the east-bound main is one, is it?

A. Yes, sir.

Q. That let you into a cross-over?

A. Yes, sir.

[fol. 161] Q. That took you from here to another switch that had to be thrown? (Indicating on said exhibit.)

A. Yes, sir.

Q. To let you out on the lead?

A. Yes, sir.

Q. Who threw this switch on the east-bound main?

A. Fitzgerald.

Q. And then who threw this one? (Indicating on said exhibit.)

A. The other conductor or the field man had this lined up when we went across first and left them open.

Q. When you went across it first? What do you mean?

A. I am not sure whether they left them *upon* or not.

Q. Don't you know that is where you stopped and waited for someone to throw that switch?

A. After we came back.

Q. After you came back with the cabooses, that is where you stopped and waited until that switch was thrown?

A. Yes, sir.

Q. So you did your waiting south of Irving Park boulevard after all, didn't you?

A. The engine stood on Irving Park.

Q. Did you have to stop to wait for that switch just south of Irving Park boulevard to be thrown for you?

A. I wasn't standing south of Irving Park boulevard.

Q. I am not asking you that. Did you have to stop there? You said a moment ago you did while someone threw that switch south of Irving?

A. The other switch, on the main line.

Q. I don't care anything about that. I want to know if you had to stop while someone threw that switch to let you into the lead from the east-bound main?

Mr. McInerney: He did not say that.

A. The switch was thrown by the time I got there. The man, Cutler, if he did throw it—it was already thrown when I looked back.

[fol. 162] Q. What do you mean by 'if he did''? You don't know, do you?

A. No, sir, not exactly.

Q. You stopped down there, south of Irving Park boulevard, to wait until somebody could throw that switch, and then you started north, didn't you?

Mr. McInerney: He said four times that he did not.

Q. (The pending question was read.)

A. The main line switch first.

Mr. Patterson:

Q. And, second, the lead switch?

A. Yes, sir.

Q. And you stood in there, between the main line switch, and the lead switch, until the lead switch was thrown, didn't you?

A. I stood between the lead switch and Number 2 track, or number 1 track, on the lead, until the last switch was throwed.

Q. How long, do you think, your engine, the tender and two cabooses, were, in feet?

A. About—in the neighborhood of 110 feet; 120 feet over all.

Q. The engine is about 78 or 79 feet, the engine and tender?

A. About 75.

Q. And the cabooses are about 36 feet each?

A. No, sir; between 25 and 30 feet. There are some variations on different cabooses.

Q. See if I get you right: You stopped and stood North of Irving, and south of number 1 switch?

A. The last stop I made I stopped for this switch. The engine was on Irving Park boulevard and the cabooses just north of Irving Park boulevard, down at number 1 switch.

Q. Tell me, if you stopped for that switch there, how your engine and cabooses would be north of that switch when you stopped for it, as you just said.

A. Because the engine is facing south and Irving Park boulevard is east and west. That brings my engine just [fol. 163] north of that switch on Irving Park boulevard.

Q. The caboose would hit the switch first, wouldn't it?

A. Yes, sir.

Q. What did you mean, a few seconds ago, when you said that you stopped for this switch, indicating the one south of Irving Park boulevard?

A. To give the man a chance to line it up, back of me, for the lead.

Q. You stopped after you passed?

A. Yes, sir.

Q. Why didn't you say so?

A. I did say so.

Q. You said, also, you stopped south of Irving Park boulevard, didn't you?

A. At first, for the first cross-over switch.

Q. And by the time you got through here these other switches were lined for you? (Indicating.)

A. These switches I didn't pay no attention to after I got over here (Indicating on defendant's exhibit 1); after I get there they are all red or green.

Q. Were they red or green?

A. As I understand, Number 2 was red, lined for number 2 track.

Q. Do you know?

A. I couldn't see anything on account of the belt engine going around the curve, but that is what it must have been because the caboose was supposed to go on the track.

Q. Where was the belt engine going?

A. On the new lead.

Q. That blocked your light from number 1 switch?

A. It would just about catch number 2 switch.

Q. Was number 1 red or green?

A. Green. In fact that is a straight track.

Q. How long did you stand there?

A. Why, in the neighborhood of, maybe a minute, just [fol. 164] long enough to give the man a chance to line the switch and get back on the front foot-board on the head of the engine.

Q. And at that time this train, the belt engine, as it has been called, passed you, did it, as you stood there?

A. That was practically by me then.

Q. Then you started up to give these cabooses a kick?

A. Yes, sir.

Q. How far had you gone from the place where you stopped until this accident happened?

A. Not very far.

Q. How far?

A. Over all?

Q. Yes.

A. About 45 feet.

Q. That is all, over all, with the stop, and to give the kick to the cabooses you get up considerable speed, and then you get a signal and the pin is pulled and you stop and the cabooses go on; is that right?

A. No, sir.

Q. Isn't that the way you make a kick?

A. At times, but not at all times. It depends on where the men are placed and about the way the conditions are.

Q. How can you make a kick if you don't run your engine at varying speeds, perhaps, and then stop it at the same time the cabooses are cut off?

A. I didn't kick them yet.

Q. I didn't ask you that, sir. How can you make a kick if you don't do it that way?

A. Then we shove them.

Q. Is a shove a kick?

A. No, sir.

Q. I didn't ask you about shoving, but I am talking about kicking. How can you make a kick unless you get your speed and stop your engine when the pin is pulled so as to let the cars or cabooses roll on?

A. I don't have to give them much of a start at all. It depends on the condition of the lead and the rail.

[fol. 165] Q. (Pending question read.)

A. You don't have to get up very much speed.

Q. Did I ask you that?

A. I don't understand your question.

Mr. McInerney: I will admit that you can't make a kick without speed.

Mr. Patterson: Don't try to help this man out.

Mr. McInerney: I don't need to help him. He is taking care of himself all right.

Mr. Patterson:

Q. Answer the question. Can you make a kick without doing as I have stated—start your engine and stop it when the pin is pulled so the cabooses or cars may roll on?

A. You can't make a kick unless you, say, come up to 4 or 5 miles an hour.

Q. I am not talking about the speed. I am asking you if you can make a kick without doing what I say.

A. You don't have to get up more speed.

Mr. Patterson: I will ask your Honor to instruct the witness to answer the question.

The Court: Answer the question.

(The pending question was read.)

A. I can't answer it.

Mr. Patterson:

Q. You have made hundreds of kicking movements, haven't you?

A. Yes, sir.

Q. When the engine is stopped in a kick movement and the pin is pulled and the cars or the cabooses are uncoupled, what do you do with your engine?

A. Stop it.

Q. What happens to the cars?

A. They run along.

Q. That is kicking, is it?

A. Yes, sir.

Q. That is the only way you can do it, too, isn't it?

A. Yes, sir.

[fol. 166] Q. Now, how far would you have to kick these cabooses that night?

A. Would have to kick them?

Q. Yes.

A. It all depends on where they went to.

Q. You don't know, do you?

A. I don't know at that present time, no, sir.

Q. If they were going into number 2 switch you would have to give them a hard enough kick to roll them down the track and in onto that track?

A. About 50 feet.

Q. And if they were going onto some other, it would depend on where they would have to go, would it?

A. Yes, sir.

Q. At the time you started to make that kick movement, this other locomotive was north of your cabooses, wasn't it?

A. Yes, sir.

Q. And you overtook the other locomotive until you got up even and a little ahead of it with your cabooses, didn't you?

A. I was just about beginning to overtake it with the leading caboose.

Q. Did your cabooses get ahead of that engine that night?

A. Yes, sir.

Q. And they got ahead of it and your engine got up even with it or better?

A. No, sir.

Q. It didn't?

A. No, sir.

Q. If that train was going 4 or 5 miles an hour—this belt train—and you passed it with the cabooses—how fast were you going?

A. The way that a——

Q. No; don't argue about it.

A. About 5 miles an hour.

Q. And he was going about five?

A. Yes, sir.

Q. And you got ahead of him?

A. Yes, sir.

Q. How did you do that?

A. Because, before I overtook him I was standing still on that crossing while he was overtaking my caboose, and [fol. 167] in this short movement, while I started to kick these cars, in that short distance, I overtook his cars.

Q. You only had a short distance and had to get them rolling, as you say?

A. If I was going, yes, sir.

Q. How did you pass him if you were not going as fast as he was?

A. The tail end of that—the leading caboose, the second caboose north of the engine—about that time, must have been just even with his engine, or so—I couldn't just say exactly, because I didn't pay much attention at that time. I didn't expect anything to occur of that kind.

Q. Where was Fitzgerald, the other switchman?

A. On the front foot-board of the south engine. Cutler was in there to pull the pin back down there.

Q. And Hudson, the conductor, was down in the yard somewhere?

A. About between number 2 and number 1 switch; closer to number 1 switch.

Q. How do you know?

A. Because I could just see him around the curve.

Q. You could just see him around the curve?

A. Yes, sir, a little back. There is enough clearance from the engine cab, and I can see a man.

Q. You saw Hudson there?

A. Yes, sir, just about half way down number 2 and 1.

Q. And your engine was headed south?

A. Yes, sir.

Q. Was Hudson on the east or the west side of the track you were on?

A. On the west side.

Q. The engineer's side is the right-hand side?

A. Yes, sir.

Q. You were on the east side?

A. I was on the west side of the cab.

Q. The right-hand side as you were headed south?

[fol. 168] A. Yes, sir.

Q. Is there a pronounced curve there?

A. There is just a little. I don't know what the curve is, what the degrees are; but there is a curve—just a little bit. It begins to curve——

Q. And Hudson gave you a washout sign?

A. Yes, sir.

Q. And didn't see anybody else there where Hudson was?

A. No, sir.

Q. There was nobody else there with him that you saw?

A. I couldn't see much more than this. Hudson—the way the belt train was, around here (indicating on defendant's exhibit 1), and I was here. I could just get him. That is all I could get.

Q. You knew that switchmen, railroad men, car repairers crossed that track right along, day and night, right here, from the oil houses, across to the depot, didn't you? (Indicating on said exhibit.)

A. At times they do, yes, sir.

Q. You had seen them do it hundreds of times before this accident?

A. Yes.

Q. You knew that someone might come across there any minute, didn't you?

A. That is pretty hard telling. They are apt to bob up anywhere.

Q. And you knew, also, that you were moving at a speed that would bring your cabooses out ahead of that engine moving north, didn't you?

A. They would practically.

Q. You were overtaking, getting ahead of the engine going north, weren't you?

A. From number 1 down to 16 switch don't make any difference to me——

Q. Answer me. You knew that you were overtaking and you actually overtook and passed this belt engine, with your cabooses, didn't you?

A. I knew that we were going to overtake them.

Q. And you were going to make a kick there?

[fol. 169] A. Yes, sir.

Q. There wasn't anyone on the head end of your cabooses, the north end, was there?

A. Not at that time.

Q. Did you have your dim headlight on?

A. I don't need no dim headlight.

Q. I didn't ask you that.

A. No, sir, I didn't.

Q. Did you have on your bright headlight?

A. Yes, sir, 100 watt.

Q. Are there two kinds of headlights on your locomitive?

A. Yes, sir.

Q. You had the bright lights on that night in the yard?

A. One hundred watt. That comes under the Interstate commerce for yard service.

Q. What do you mean by 100 watt?

A. Dimmer than 250 watt. We have two classes of bulbs; one is 250 and one is 100 watt for headlight service only.

Q. In the yard?

A. No, sir; 250 is for main line service and 100 for switching service.

Q. You had a 100 on?

A. Yes, sir.

Q. You didn't have the bright headlight that they use on locomotives?

A. No, sir, not me.

Q. You have no interest in this case at all, the outcome of it?

A. No, sir.

Q. Did you know on which track this belt engine and train—into which track it was going?

A. Sir?

Q. Did you know where this belt engine and train were going—that train that pulled in there?

A. No, sir.

Q. When you got the washout from Hudson how fast were you going?

A. About 4 or 5 miles an hour.

Q. How far from the north end of your caboose was Hudson when you got that signal?

A. From the cab?

Q. No, from the north end of the north caboose to where [fol. 170] Hudson was when you got that signal?

A. I couldn't just tell. It was at night—I judge about 50 or 75 feet.

Q. Did you have the air coupled in on those cabooses?

A. No, sir.

Q. You handled the thing by what you call "straight air"?

A. Yes, sir.

Q. That applies on the engine wheels only?

A. Yes, sir, and tender.

Q. And tender? That is how many wheels?

A. Sixteen.

Q. And that is air, is it?

A. That is compressed air, transmitted by a mechanical device.

Q. Your equipment was all in good shape that night, was it?

A. Yes, sir.

Q. After this man was hit how far did you go?

A. I judge about 25 or 30 feet.

Q. Did you see this man at all before he was hit?

A. Sir?

Q. Did you see this man, Rock, at all, before he was hit?

A. No, sir.

Q. A "washout" signal means an emergency, does it?

A. Yes, sir.

Q. And you got a hard stop?

A. A wicked sign stop.

Q. A "wicked sign"? What do you mean by that?

A. Yes, it is a little more wicked.

Q. After you got that wicked signal from Hudson, 50 feet north of your cabooses, you ran about 75 feet, didn't you?

A. About 35 feet after I got the washout—30 to 35 feet.

Q. Hudson, you said, was 50 feet north of your caboose when he gave you that washout?

[fol. 171] A. I couldn't exactly say how far it was, because it was dark.

Q. Didn't you say that a moment ago?

A. About, I said, in that neighborhood.

Q. And Rock was hit right about the place where Hudson was, wasn't he?

A. I couldn't tell you. I didn't see Rock.

Q. Did you know what the washout signal was for when you got it?

A. No, sir.

Q. With that straight air on, these sixteen wheels on your engine and tender in good condition, moving 4 or 5 miles an hour, you could stop that engine and those two cabooses in 15 or 20 feet, couldn't you?

A. Not exactly.

Q. About that?

A. No, sir.

Q. How far would it take to stop?

A. I guess I done about all that was in them, because it takes a second or two to shut off the engine.

Q. How great a distance would it take you to stop, when you put on your emergency brake and gave her sand, how far would it take you to stop?

A. I couldn't tell you exactly.

Q. Well, about? You are an engineer.

A. I have no idea.

Q. You have had eighteen years' experience in driving locomotive engines?

A. Yes, sir.

Q. Do you mean to tell us you could not give us an idea in what distance you could stop an engine and tender, with two cabooses, moving over a track, at a speed of four or five miles an hour?

A. It all depends on the condition of the rail and the weather and air-braking power.

Q. Your air-braking power was all right?

A. Yes, sir.

Q. The weather was clear and cold?

[fol. 172] A. Yes, sir.

Q. The rail was what you would call a good rail?

A. A dry rail.

Q. With all those things in mind do you mean to still say you can't determine or give us an idea in what distance you could have stopped those cabooses with that engine?

A. In about 25 feet.

Q. Why didn't you stop when you got that washout signal, when he was 50 feet north?

A. Sir?

Q. Why didn't you stop when you got that washout signal, when he was 50 feet away?

A. Who was 50 feet away?

Q. Hudson, 50 feet north of your caboose?
A. I stopped in 30 or 35 feet—30 feet.

Mr. Patterson: That is all.

Joseph M. Eicha, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McInerney:

Q. Give us your name, please?
A. Joseph M. Eicha.
Q. Where do you live?
A. 1103 George street, Chicago.
Q. What is your occupation now?
A. Switchman.
Q. By whom are you employed?
A. By the Burlington railroad.
Q. You worked for the Soo Line once, did you?
A. Yes, sir.
Q. In what capacity?
A. Well, part of the time as engineer and part of the time as fireman.
[fol. 173] Q. Where did you work?
A. Where?
Q. Yes.
A. In the Chicago district, in the terminal district, from Schiller Park.
Q. What did you do at the Kolze yard? Did you have much to do out there?
A. I was on a job where I delivered and received trains from Clearing and brought back to Kolze yard.
Q. Is that what they call the Belt Run?
A. Yes, sir.
Q. You got trains from the Belt at Clearing and they are taken to Kolze?
A. Yes, sir.
Q. And that is what is known as the "Belt Run"?
A. Yes, sir.
Q. When is that due at Kolze?

A. That all depends. It has no specified time when due there.

Q. Between what hours?

A. Generally between 7 and 8 o'clock, P. M.

Q. Depending on the luck you have on the way?

A. Yes, sir.

Q. Were you fireman on that run?

A. Yes, sir.

Q. How long were you fireman prior to December 31, 1924?

A. On that run?

Q. Yes.

A. About three years.

Q. You handled it every day, did you, practically?

A. Yes, sir.

Q. When did you leave the employment of the Soo Line?

A. The 10th of January, 1926.

Q. Did you take up some other occupation?

A. Yes, sir.

Q. What did you do?

A. Working for the Burlington railroad, switching.

Q. Did you work in June there?

A. Yes, sir. I worked at the Fair store a little while.

Q. That was engine 2657, was it, or do you recall the [fol. 174] number—or 2446?

A. 2448, I think it was. This is some time ago and I haven't been out there.

Q. You don't remember the exact number?

A. No, sir.

Q. Who was your engineer?

A. R. G. Hawley.

Q. Who were the rest of your crew?

A. I don't now remember who the head man was on that job, whether it was John Rodgers or not, but I think it was John Rodgers at the time, because he worked for us quite a while.

Q. He was the head man?

A. Yes, sir, I think he was. I never gave it a thought afterwards. I was only called on this case yesterday. I wouldn't say it was Rodgers.

Q. Do you recall the headlight on that engine?

A. Yes, sir.

Q. Do you know whether you could dim those headlights or not?

A. Yes, sir.

Q. You could dim your headlights?

A. Yes, sir.

Q. How was it done on that engine?

A. With a switch in the engine.

Q. Who did it, the engineer or you?

A. The engineer.

Q. With reference to coming into the yard on that belt run, what can you say as to what the practice was with reference to dimming headlights in the Kolze yard?

A. Our practice was never to fail to do it: to dim the light when we got to a cross-over switch, about sixty-five car lengths away from the Irving Park boulevard crossing.

Q. You mean south of Irving Park boulevard?

A. Yes, sir, south of Irving Park boulevard.

Q. When you say 65 car lengths, how many feet is that? About 2,500 feet?

A. Yes, sir. The cars will average 40 feet.

[fol. 175] Q. As you approached Irving Park boulevard, December 31, 1924—do you recall that particular night, the night a man was injured?

A. Why, yes, I do.

Q. Was anything done that night with reference to the headlight?

A. Yes, sir.

Q. What was done?

A. Dimmed at this cross-over switch. We always do that to protect the men working in the yard.

Q. You were working on the left-hand side of the engine?

A. Yes, sir, on the left-hand side of the engine.

Q. Looking north?

A. Yes, sir.

Did you keep your eyes out from then on?

A. Yes, sir.

Q. Was there any glaring headlight on that engine, from 65 car lengths south of Irving Park boulevard up to the time of the accident?

Mr. Patterson: Objected to. He has not said they dimmed them that night.

Mr. McInerney:

Q. Didn't you tell me they dimmed them that night 65 car lengths south of Irving Park boulevard?

A. Yes, sir, we did.

Q. From that time until the point of this accident were they afterwards raised again?

A. No, sir, never in the yard.

Q. What was the light in front of your engine that night?

A. Dim.

Q. How fast were you going after you crossed Irving Park boulevard?

A. Oh, I judge about five miles an hour, because we go slower for the men to throw the switches at the rear of the train.

Q. Did you see these cabooses?

A. I got a little view of them as they were shoving them across Irving Park Boulevard—the crew on the opposite side of us.

Q. You just got a view?

A. Yes, I got a view of them.

[fol. 176] Q. Did you see this man that was injured that night at all?

A. I didn't know it was him, but I seen a man coming from the eating-house, across the vacant lot, making quite a headway; he was on a little trot or fast walk, in order to get ahead, across of our engine; not carrying a lantern, I thought he was one of the employees. About the time he crossed ahead of our engine he stopped in front of one of the cabooses that was shoved on the other track.

Q. At the time he crossed in front of our engine which way was he facing?

A. He was facing east.

Q. How far was he west of your track when you first saw him?

A. When I first saw him I judge he was in the neighborhood of—oh, 150 feet away or so, when I first noticed him.

Q. I wish you could show me on this map, as near as you can tell, at what point he crossed in front of you. This is number 1 switch; this is number 2 switch; this is the new yard lead track, where you came in. (Indicating on defendant's exhibit 1.)

A. Yes.

Q. And here are the cars? (Indicating.)

A. Yes, sir.

Q. About where did he cross in front of your engine?

A. He crossed right across over here. (Indicating on defendant's exhibit 1.)

The Court: Speak out so the jurors can hear you.

A. (continued). He crossed over a little north of the depot door.

Mr. Patterson: Meaning the depot east of the track?

A. That is where he was headed for, from what I could see when he was coming across the track.

Mr. Patterson: Indicating a line to the west of the depot?

[fol. 177] Mr. McInerney:

Q. There is a mark here, "X-Over"; was it about where "X-Over" is here? (Indicating on defendant's exhibit 1.)

A. Yes, sir; right about there.

Q. From the time you saw him, 150 feet west of that point, his head was facing east, was it?

A. Yes, sir.

Q. Did he look towards your engine?

A. It was dark. I didn't pay no attention. I wouldn't say positively whether he looked at our engine or not. I saw someone moving up. I know it was him now.

Q. Did he slacken his pace?

A. Not during the time I saw him.

Q. How far in front of your engine did he cross?

A. Why—Oh, I should think it would be in the neighborhood of 15 feet or so.

Q. That is the last you saw of him, when he got out of your vision?

A. That is the last I saw of him.

Q. You knew afterwards that he was injured.

A. I knew afterwards that he was injured.

Q. Did your train come to a stop?

A. Yes, sir.

Q. How far did you go before you came to a stop?

A. I don't think we went over 30 feet.

Q. When you stopped where was the front of your engine with reference to the rear end of the cabooses on lead track number 2?

A. Our engine must have been, or was about, possibly 30 or 40 feet further north than the cabooses when they came to a stop.

Mr. McInerney: That is all.

Cross-examination.

By Mr. Patterson:

Q. Now, Mr. Eicha, you saw this man, you said, coming across the lot from the eating-house?

A. Yes. I don't know whether he was coming from the eating-house or not, but he come across that lot where [fol. 178] the eating-house is.

Q. You mean the lot west of the car bodies? Where the oil house is and this hotel?

A. Yes, sir.

Q. He was coming across there?

A. Yes, sir.

Q. Where was your engine then? Had it crossed Irving Park boulevard?

A. When I saw him coming I was just approaching Irving Park boulevard.

Q. Were you on it or had you crossed it?

A. Well, I will—the front end of the engine was just about on Irving Park boulevard.

Q. The front end of your engine was on this new yard lead and on Irving Park boulevard?

A. On Irving Park boulevard.

Q. This man was in here, between the oil shanty and this hotel, this vacant lot?

A. He was coming across there. (Indicating on defendant's exhibit 1.)

Q. He was there? You saw him?

A. Yes, sir.

Q. Was it a dark night?

A. Yes, it was dark.

Q. Did your headlight light things up over that way?

A. A bright light would light it up as clear as day.

Q. You had your bright headlight on, did you?

A. No, sir. I said before we never had our bright light on when we were pulling in there.

Q. What did you mean just now when you said the bright light would light it up as bright as day?

A. If we had it on it would.

Q. That is all you meant by that?

A. Yes.

Q. The light was enough ahead of you that night, if you saw this man on Irving Park boulevard, coming on a trot, down in here, between the hotel and the car body shanty—(Indicating on defendant's exhibit 1.)

A. I would have seen him coming across there if there was no light at all on the engine, because he was carrying a lantern.

Q. You don't know whether that man that you saw was [fol. 179] the man that got hit with the caboose or not?

A. Yes, sir, absolutely.

Q. You are sure of that?

A. Yes, sir, I am sure of that.

Q. You didn't see him hit?

A. No, sir, I didn't see him hit.

Q. How far do you think it is from over here, between these car bodies and this hotel, over to this "X-Over" point, where he passed in front of you?

A. From the hotel to there? (Indicating on defendant's exhibit 1.)

Q. From where he was, between the hotel and the car bodies, over to there? (Indicating on said exhibit.)

A. Well, I would—it is about 125 feet.

Q. Don't you know, as a matter of fact, it is a good bit further than it was from Irving Park boulevard up to where this man was hurt?

A. From Irving Park boulevard?

Q. Yes, it is further over here than it is from Irving Park boulevard up to the place where he was hurt?

A. I don't quite understand you, Mister.

Q. You think about 150 feet?

A. Well, I have just given an estimate. I think it is about 150 feet from the eating-house to the track where we were on.

Q. You saw him distinctly?

A. I saw a man coming across there with a lantern in his hand.

Q. Walking, running or what?

A. He was on a fast walk, a slow trot, evidently hurrying to get ahead of the engine.

Q. How do you know?

A. I was looking at him when he was coming across.

Q. Why do you say "Hurrying to get ahead of the engine"?

A. Because he wanted to get on the other side of the [fol. 180] engine when we blocked him.

Q. How do you know what was in his mind?

A. If he didn't want to get across there before we blocked him he would have stood still to let us go by.

Q. You don't mean to tell us you know what was in that man's mind when he was going up there?

A. No, I don't know that.

Q. Did you talk with anybody about that before you took the witness stand?

A. About what?

Q. About this man hurrying to get across ahead of you?

A. No, sir.

Q. You never talked to anyone in your life about that?

A. I have never been out there in eleven months now.

Q. Did you ever talk to anybody about that particular part of your testimony?

A. No more than the conversation we had out here in the hall.

Q. Did you give a statement about this accident in the beginning?

A. Did I give a statement?

Q. Yes.

A. I didn't give a statement to anybody.

Q. You didn't talk to any one from the claim department?

A. The claim agent asked me what I knew about the case. That is the first time I met that gentleman, and I told him what I knew about it.

Q. When was that?

A. This afternoon.

Q. Not having your attention called to it since two years ago this month, you remember distinctly that that night you turned the headlight off of the engine?

A. Yes, sir. I remember that distinctly because I never failed to have the headlight off when I went in there, if I went in there 100 times a day.

Q. That is the only reason you know?

A. No, sir; I know well enough it was turned off.

Q. Did you see the engineer turn it off?

[fol. 181] A. Yes, sir, I have.

Q. That night, too?

A. Yes, sir, that night.

Q. You have a distinct recollection of that?

A. Yes, sir, I have a distinct recollection that that light was turned out that night as well as any other.

Q. Isn't the reason you say they were turned out that night because they are supposed to be turned out every night when you come in there?

A. Because I am trying to make this so certain——

Q. No, isn't that the reason you say it was turned out that night due to the fact that they are supposed to do it every night?

A. The reason I am so positive is because I made it a point to see that they were turned out every night.

Q. Let me ask you, the reason you remember it so distinctly is because they were always supposed to do it? Isn't that the fact?

A. They are supposed to do it. I guess many times some of them don't.

Q. And you have no independent recollection now about this night?

A. Why, sure I have.

Q. Any more than you have of other nights, have you?

A. I have just as much of this night as I have of any other night, because I see, when he was coming before me, and if there was a bright light that I could know who it was exactly—I didn't know that it was this man or any other man. I see a man going by there with a lantern in his hand, and if the bright light was on I could see who it was.

Q. You did see him 50 or 200 feet west of the track you were on, didn't you?

A. Yes, sir, I see a man coming across with a lantern and hurrying to get ahead of our engine.

Q. And you didn't know this man?

A. I didn't know his name, no.

[fol. 182] And you only saw him when he was west of your train?

A. When he was west of my train.

Q. You never saw him afterwards?

A. No, sir.

Q. You don't know whether that man got across or did not get across, of your own knowledge, do you?

A. Why, cetainly, I know he went—

Q. He got across?

A. Why, he got across, certainly.

Q. You don't know of your own knowledge whether that man was John Rock or not, do you?

A. At the time he crossed ahead of us, no. Not at the time he crossed ahead of us, I don't know who he was.

Q. You don't know whether that man that crossed ahead of you, that you saw away over there back of the hotel—whether that man was the man that was hit or not, of your own personal knowledge, do you?

A. Of my personal knowledge?

Q. Yes.

A. As soon as the accident occurred we knew who he was.

Q. Well, you knew Joe Rock, as you fellows called him there, did you?

A. Yes, sir.

Q. You don't know whether it was Joe Rock that you saw over there back of the hotel, do you?

A. No, not at the time; I couldn't see who it was exactly, but if we had the bright light on I could see who it was.

Q. Your statement a while ago that the bright light was on and you could see—that was just a slip of the tongue, was it?

Mr. McInerney: I object to that, your Honor.

The Witness: A slip of the tongue?

Mr. Patterson: A while ago you said that if you had the bright light on you could see that man.

A. I said with the bright light on I could see as well as day and see who it was.

[fol. 183] Q. Was there a man on the front end of your engine?

A. At the time?

Q. Yes.

A. No there was not, I don't think. I don't know whether he was in front of the engine or not, because if he was, he works on the engineer's side.

Q. You don't know?

A. No, I don't know.

Q. Who was you head man?

A. I called him "Jack"—Mr. Rogers was working there quite a while. I don't know whether it was him or not.

Q. As you came along, going north, about where was your engine when the cabooses passed you?

A. When the cabooses passed me, just approaching Irving Park boulevard.

Q. By "approaching" I don't understand you. On Irving Park boulevard?

A. Yes, just about on Irving Park boulevard.

Q. Where these cabooses passed you?

A. Yes, sir.

Q. Did they keep on going or did they stop?

A. They kept on going. There was nothing there to stop them.

Q. And those were the cabooses that you later knew hit Rock?

A. Yes, sir.

Q. They were out ahead of you, then, at the time they hit him?

A. They were on the opposite track from us.

Mr. Patterson: That is all.

Redirect examination.

By Mr. McInerney:

Q. Did you see the cabooses after you crossed Irving Park boulevard?

A. No, not until after they came to a stop, but I saw them moving as they went by us on Irving Park boulevard. [fol. 184] Q. That is the last time you saw the cabooses?

A. That is the last time I saw the cabooses, until we stopped, and they were stopped and we took care of Rock.

Mr. McInerney: That is all.

The Court (addressing the jury): You are all excused, gentlemen, until 10 o'clock Monday morning.

Whereupon an adjournment was taken until 10 o'clock, A. M. Monday, December 20, 1926.

Monday, December 20, 1926.—10 o'clock, a. m.

Court met pursuant to adjournment.

Present: Mr. Patterson, for the plaintiff, Mr. McInerney, for the defendant.

JOHN B. HAMILTON, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McInerney:

Q. Will you state your full name, please?
A. John B. Hamilton.
Q. Where do your live, Mr. Hamilton?
A. Chicago.
Q. What is your occupation?
A. Trainmaster of the Illinois Central Railroad.
Q. How long have you been in the railroad business?
A. Twenty years.
Q. What positions have you held?
A. Well, anything from a yard clerk up to a trainmaster, in the transportation department.
Q. Does that include experience in the yards?
[fol. 185] A. Yes, sir.
Q. Switching?
A. Yes, sir.
Q. Handling of trains and all that sort of thing?
A. Yes, sir.
Q. I will ask you, Mr. Hamilton, to look at this map, defendant's exhibit 1, if you please. I am referring now to the two tracks east of the depot—this is north. If an engine backed into that track, hooked on to two cabooses, headed south across Irving Park boulevard, went south to the crossover and backed in and shoved the two cabooses on this track, across Irving Park boulevard, a public highway; then down through this old yard lead track, with the intention of kicking the two cabooses on to track number 2 at night time, is there a universal practice or custom with reference to the method of protecting the lead car in that operation—are you familiar with that?

A. Oh, yes.

Q. What is the practice and custom?

A. The practice and custom and the rule is that a white light must be displayed on the front end of the lead car while going over a crossing and over the main line back to the yard tracks—the inside tracks.

Q. What is the practice after it arrives in the yard limits, north of the north line of Irving Park boulevard, ready to be kicked on to Track No. 2, with respect to whether the lead car is then protected by a man or a light?

A. The rule—

Mr. Patterson: I object to the rule.

The Court: Objection sustained.

Mr. McInerney:

Q. What is the practice?

A. The practice is not to be protected, not to have a white light on the front end of the leading car.

Mr. McInerney: That is all.

[fol. 186] Cross-examination by Mr. Patterson:

Q. Mr. Hamilton, might there be any difference of opinion about that?

A. No, not among practical railroad men.

Q. You would have a man on the rear end of the caboose, on the main line, even though that main line is in the yard limit, wouldn't you?

A. Yes, sir.

Q. If you were shown that the main line, at the yard limit, is farther south than that map goes, you would keep a man on there until you got north of Irving Park Boulevard would you?

A. Yes, sir, as long as it was on the main line.

Q. And on the lead to the south of Irving Park Boulevard, coming across Irving, over a street crossing, a highway?

A. Yes.

Q. Do you make any distinction at all in the handling of cabooses, live cabooses and box-cars—freight cars?

A. No, sir.

Q. None at all?

A. No, sir.

Q. Whether there are men in them or whether there are not?

A. No, not so far as the white light is concerned now. Naturally there is more attention given to a car that has some men inside of it.

Q. Suppose you had a caboose being put over there for the purpose of connecting it on a train later, do you mean to say you would just kick that caboose around the same as you would a box-car?

A. Yes.

Mr. Patterson: That is all.

Mr. McInerney: That is all, Mr. Hamilton.

[fol. 187] Charles E. McCarty, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. McInerney:

Q. Give us your full name?

A. Charles E. McCarty.

Q. Where do you live?

A. 530 Arlington Place, Chicago.

Q. What is your occupation?

A. Yardmaster for the C. B. & Q. Railroad.

Q. How long have you been in the railroad business?

A. Thirty-seven years.

Q. What has your experience consisted of?

A. Well, that has included almost everything, I guess, except engineering.

Q. Except engineering?

A. Except running an engine; everything that is in that line of work, in train work.

Q. In the handling of trains?

A. Yes, sir.

Q. You have been in the yards, have you?

A. Yes, sir, in the yards all the time.

Q. Switching and all that sort of thing?

A. Yes, sir.

Q. How long have you been yardmaster for the Burlington?

A. Twenty years.

Q. Where are their yards?

A. Well, I have been in all of their yards.

Q. You have been in all of their yards, and you have been in other railroad yards?

A. Yes, almost all of them.

Q. Are you familiar with the general practice and custom with reference to switching movements in railroad yards in this city.

A. I am.

Q. In this vicinity?

A. Yes, sir.

Q. I will ask you to look at that map, marked defendant's [fol. 188] exhibit 1, this being the north. (Indicating on defendant's exhibit 1.)

A. Yes.

Q. Take two cabooses on this track, which is the track east of the depot; an engine backs in and hooks on to the two cabooses; heads south, across Irving Park Boulevard, down on the main line, across to the crossover, on this track, called "over track" (indicating on defendant's exhibit 1); then shoves the two cabooses in and over that crossover track, down to the switch on Track 2, or near there, with the intention of kicking those cabooses into Track 2; they are to be placed in there later on to be coupled into freight trains; is there any universal practice or custom with respect to the protection of the leading car in that movement that you know of?

A. None at all. It is a clear track and no main line track.

Q. In a movement of that kind, Mr. McCarty, are you familiar with the general practice or custom in railroad yards with reference to the protection of the leading car?

A. I am, yes, sir.

Q. What is the custom?

A. If it is a clear track, why, we would kick it in there on that clear track; wouldn't ride it at all.

A. Take the whole of that movement, what is the custom or practice from the beginning, with reference to protecting the rear end, by man or light?

A. Pulling out of there or shoving in, if we were going over a street corssing, why we would ride the leading car, shoving it, and then, when we got into the yard we would kick it and cut it off, let it run into the track if it is not going to do any damage to the car.

Q. Without any protection?

A. Without any protection at all.

[fol. 189] Mr. McInerney: That is all.

Cross-examination.

By Mr. Patterson:

Q. Suppose that caboose was being shoved along there over a pathway where hundreds of employees cross and recross from the oil-houses, boarding or eating-house, over to the depot; suppose it is being shoved over that place where they cross, east and west, hundreds of them, would that make any difference?

A. If it was in the yard it wouldn't make a bit of difference.

Q. It wouldn't?

A. No.

Q. What do you call "the yard?"

A. Wherever there is a switching lead.

Q. Where the switch leads are?

A. Yes.

Q. If it is within 200 feet of a switchlead, how about that then?

A. Two hundred feet of a switch lead?

Q. Yes, switches—a lead-off?

A. If it was not a public crossing we wouldn't protect the car at all.

Q. No matter if you knew, in handling that train, that hundreds of trainmen cross and re-cross there at all hours of the day and night, you would pay no attention to it?

A. No, sir; because we figure this way—

Q. Wait a minute; I didn't ask you to figure.

Mr. McInerney: He has a right to answer.

The Court: Let him answer the question.

Mr. Patterson:

Q. You wouldn't pay any attention to those people crossing and re-crossing?

A. No, sir, we wouldn't pay any attention to them at all.

Q. What do you call shoving cars and making up trains? [fol. 190] A. Why, just like pulling out of a track, pulling up the lead. Then there are always three men to a crew—always three men. There would be one man down in the field; one man cutting off the cars and the foreman giving the signals.

Q. Where is the conductor supposed to be?

A. He is supposed to be giving the signal.

Q. And one fellow, if you are handling a live caboose, is supposed to be riding the head end of that caboose?

A. No, sir.

Q. You never knew that to happen?

A. No, it never happens. The only time when we are handling a way-car or caboose is where they are running in on a track and they are liable to hit the cars, and we do that for the protection of the trainmen in the caboose.

Q. If you are kicking a live caboose and you are within 100 or 200 feet of the track, where it is going in, you would have somebody on the hind end of it, wouldn't you, if it was going to be kicked in on to a track—

A. If the car was going in on a clear track we wouldn't. That is the foreman's part of it—to use judgment about kicking a car.

Q. How do you know whether this is a clear track or not?

A. We pretty nearly always know.

Q. Do you know anything about a track being a clear track at all?

A. I don't know anything about it.

Q. Suppose that switch track No. 2 was filled with trains or cars and this live caboose would go in on it, do you mean to say you wouldn't have a man on the head of the caboose?

A. If the train was going in there and the track was closed, if we knew the car was going to hit, then we would ride the car in there.

[fol. 191] Mr. McInerney: We admit that.

Mr. Patterson:

Q. When you kick a caboose in on a track full of cars where the train is made up, or a way-car, as you call it, you have someone ride it, too, don't you—when you kick it in on a line of a track?

A. Why, if we don't expect it to hit a car, if the car is going to run down there to the cars, we don't ride it. We have only one man in the field to throw the switches.

Q. If you are switching a way-car on the track, where it is going into a train, do you mean you can judge with exactness that kick so it will go into the right place?

A. In most cases when a man—

Q. Can you judge with exactness?

A. No, not exact; nothing exact at all.

Q. Do you call shoving two cabooses up a lead track a main line movement?

A. Up what track?

Q. Up a lead track?

A. A lead track, no.

Q. Do you call that a shifting of cars in the yards shifting two cabooses?

A. Yes, I would call it a shifting of cars.

Q. You make no distinction between the way you handle cabooses, where men are in them, and box-cars, do you?

A. Yes, we do—yes, sir, we do.

Q. What difference?

A. Just the difference is this: If the cars are close up to the switches, just in the clear, why, then we are going to ride them; but if the cars are away down the track, why, [fol 192] we are not going to ride them.

Q. Is that true in every yard you have worked in?

A. Yes, sir.

Q. How about these hump yards, where cars run by gravity? A man rides every car except empties, doesn't he?

A. If they are going away down the yard, yes; that is, a gravity yard. Of course, there is a difference in the yards.

Q. And they ride them when they are kicked, too, don't they, even box-cars?

A. You don't ever ride box cars, in most cases.

Q. But you do ride it when it goes by gravity in a hump yard?

A. Yes.

Mr. Patterson: That is all.

JOHN HENRY BANNING, called as a witness in behalf of defendant, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. McInerney:

Q. Give us your full name, please.

A. John Henry Banning.

Q. Where do you live?

A. 5429 Walton Street.

Q. What is your occupation, Mr. Banning?

A. Yardmaster for the Belt Railroad.

Q. How long have you been yardmaster for the Belt Railroad?

A. About eight years.

Q. What were you before that?

A. Switchman.

Q. For the Belt?

A. Yes, sir.

Q. How long were you a switchman?

A. Well, I switched four years for the Belt before that.

Q. What has been your railroad career? How long have [fol. 193] you *have* a railroad man?

A. About twenty years.

Q. You have been running in the Belt yards?

A. Yes, for the last twelve years.

Q. Where are the belt yards?

A. Well, they run from different places. They run all the way from Cragin Station clear to South Chicago.

Q. Is this the Outer Belt?

A. No; this is the Chicago Belt.

Q. The Chicago Belt?

A. The Belt Railway of Chicago.

Q. And they just handle switch movements, don't they?

A. Yes, sir.

Q. They have no main line of their own in the sense that they run out of Chicago?

A. No.

Q. They just handle switching movements?

A. Yes, that is all.

Q. For other railroads?

A. Well, they have main lines where they handle trains.

Q. But they just make switching movements?

A. Yes, sir; interchange cars for different railroads.

Q. Please look at this map, defendant's exhibit 1. This is north and this is the depot. This track, east of the depot, contains two cabooses. An engine backs in there, hooks on to the two cabooses and proceeds across Irving Park Boulevard, which is a public highway, down across here, crosses over and shoves the two cabooses over this track, called X-over track, across north of Irving Park Boulevard, on this track, Number 1, until it gets down here, with the intention of kicking those cabooses into Track No. 2. (Indicating on defendant's exhibit 1.) In that movement, at night, do you know whether there is a custom or practice among railroads with reference to whether a man rides the rear end of that leading caboose or has a light at night time, and, if so, under what conditions?

[fol. 194] A. Well, at night time he goes in and couples on—

Q. There would be no coupling operation here. (Indicating.) It is going to be kicked in here, on to the clear track for storage, awaiting another train, no coupling operation. If you don't understand the question I will explain it to you. I tried to make it clear.

A. I understand it all right.

Q. Is there a practice with reference to that operation?

A. Well, there is a practice, where a man usually rides a car in there; he rides it pretty close to the switch and lines it up or walks across and lines up in a case of that kind where it is not very far.

Q. When does he protect the rear end of that caboose, and for what purpose, with a light?

A. Well, when he is passing public highways and crossings he is supposed to.

Q. Is there any other time?
A. Not in the yards.

Mr. McInerney: That is all.

Cross-examination.

By Mr. Patterson:

Q. And if those cabooses were shoved along over a path or roadway, a passageway where hundreds of men cross day and night, trains, going back and forth from east to west, you would be very apt to have a man on there, looking out for them, wouldn't you?

Mr. McInerney: I object to that question. He talks about hundreds of men and there is no proof in the record of that. If he limits that to the employees of the railroad, in the ordinary operation of their functions, crossing that track, at or near that point, I have no objection to it.

The Court: Refer to them as employees.

[fol. 195] Mr. Patterson:

Q. Where employees, dozens of them, pass at all hours of the day and night, going east and west, crossing over this lead, if you were shoving in there—knowing that, you would have somebody on the hind end, looking out, wouldn't you?
A. Yes, sir.

Mr. Patterson: That is all.

Redirect examination.

By Mr. McInerney:

Q. What do you understand that path to mean?
A. I understand that path more as a public path; more as a highway path.
Q. If that is restricted to the use of the switchmen and the employees of the railroad; in other words, if they make use of these tracks to get to the depot, say to this oil house to fix their lanterns, and use them regularly, would you say you would have a man protecting the rear end for the pur-

pose of protecting the employees, the switchmen, the brakemen and conductors who use that right of way?

A. No, not necessarily.

Mr. McInerney: That is all.

Re-cross-examination.

By Mr. Patterson:

Q. What do you mean by "not necessarily"?

A. They know we move trains there right along, and the trainmen ought to watch out for them.

Q. And the trainmen know that men are going along there.

A. But you know we always protect a public path.

Q. Did I say anything about a public street when I first asked you that question?

A. No, I didn't hear you.

Mr. Patterson: That is all.

[fol. 196] CHARLES L. SIMPSON, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McInerney:

Q. State your full name?
A. Charles L. Simpson.
Q. Where do you live?
A. My home is at Forest Park.
Q. Forest Park, Illinois?
A. Yes, sir.
Q. What is your occupation?
A. Assistant superintendent.
Q. Of what company?
A. Of the Soo Lines—the Minnesota Division.
Q. How long have you been with the Soo Line?
A. Twenty-seven years.
Q. In what capacity?

A. Oh, I have been operator, yardmaster, train despatcher, trainmaster—I have had them all.

Q. Have you ever been superintendent at Chicago?

A. Yes, sir.

Q. When were you superintendent at Chicago?

A. From the spring of 1923 to June of this year.

Q. June first?

A. June, 1926, yes, sir.

Q. What were your duties as Assistant Superintendent of the Chicago Division?

A. I had charge of the Chicago tereminals from Chicago including the Schiller Park yards.

Q. Including the Kolze yard, so called?

A. Yes, sir.

Q. Now Schiller Park?

A. Yes, sir.

Q. Do you recall the plaintiff in this suit—do you know him?

A. Yes.

Q. When did you first meet him, if you recall?

[fol. 197] A. I believe it was the fall of 1923.

Q. Do you recall the circumstances under which you met him?

A. No, I do not particularly; only that we were hiring men.

Q. Did you have anything to do with his employment and if so, what?

A. Yes, I hired him.

Q. What is the way in which a man becomes an employee of the Soo Line, a switchman, say?

A. Well, he comes in and we give him an application paper to fill out, stating all of his record and where he has worked before coming to us; if he looks all right we give him a certificate to the doctor for a physical examination. If the doctor passes him, then we put him on the roster and furnish him with a book of rules and such tools as he needs.

Q. Do you conduct any examination of him?

A. We give him a slight oral examination to satisfy ourselves that he is a railroad man.

Q. Just generally?

A. Just generally.

Q. Do you recall whether that was done in Rock's case?

A. Yes.

Q. Do you have any personal recollection of that?

A. Yes; we do that in all cases where we hire a man.

Q. But you don't recall the circumstances in his particular case, do you?

A. Not particularly, no.

Q. There are two time freights out there that leave Kolze, 21 and 27, are there?

A. Yes, sir.

Q. Are you familiar with how they make those trains generally?

A. The first thing in the evening the cabooses are lined up on two separate tracks for 27 and 21. Then they wait for the merchandise transfers to arrive from Chicago——

Mr. Patterson: Just a moment, Mr. Witness. I object, your Honor. My objection to the question and the answer [fol. 198] is this——

Mr. McInerney: I don't care anything about it. I withdraw it.

Q. Mr. Simpson, look at this map. (Indicating defendant's exhibit 1.) You are familiar with that lay-out shown by that map, are you?

A. Yes, sir.

Q. Supposing there were two cabooses over on this track, east of the depot; an engine backs up; proceeds south with the two cabooses; hooks on to them; proceeds across Irving Park boulevard, down south to the cross-over; crosses over on to this track, which is Track No. 1, the lead——

A. The lead?

Q. (continued). Track No. 1, the lead; and shoves those cabooses across Irving Park boulevard, down here, with the intention of kicking them into Track No. 2 at night; do you know what the practice in railroading, and particularly in the Soo line yard, was in 1924, in December, with reference to protection of the rear or the leading car of that movement, and what you did about it and how you did it—(indicating on defendant's exhibit 1,) from the time you took them from the caboose track, east of the depot, with the engine heading on, crossing the track, backing up

and shoving them into the yard, with the intention of kicking them on to the switch track?

A. We would require, in making a move from the caboose track to switch across Irving Park boulevard, there would necessarily have to be a man on the head end of the caboose.

Q. With a light?

A. With a light, after he has passed the boulevard, the rules do not require any further protection in the yard.

Mr. Patterson: I asked to strike that out with reference to the rules.

The Court: The answer will be stricken out with reference to the rules.

[fol. 199] Mr. McInerney:

Q. Never mind the rules. Tell us what you did, the custom and the practice?

A. The practice is to have a man on the head end of the caboose, with a light, passing Irving Park boulevard. The man can then get off, pull the pin, and kick the cabooses down into the tracks. That is customary.

Q. After the rear end, lead car, gets across Irving Park boulevard, north-bound, under your general practice and custom, is there any further protection required?

A. No, sir.

Mr. McInerney: That is all.

Cross-examination.

By Mr. Patterson:

Q. Where was your office at the time this accident happened?

A. At Roosevelt and Canal.

Q. Your office, all the time that you were superintendent of terminals, was at Roosevelt and Canal street, was it?

A. Yes, sir.

Q. How many times in all those months or a year or two were you ever at the Kolze yard?

A. I can't tell, but I usually went out there once or twice a week; some times oftener.

Q. Your hours were what?

A. I didn't have any regular hours.

Q. What time did you get to your office ordinarily?
A. Eight o'clock, or 8:30.
Q. In the morning?
A. Yes, sir.
Q. You were there until about six at night?
A. Yes, sir.
Q. The only other work you did at night time was when you would be called out, wasn't it?
[fol. 200] A. I went out to Kolze yard quite frequently in the evening.
Q. The only other times you would not be in Chicago would be when you were called out at night?
A. No; I would have duties——
Q. How many times do you think you were in the Kolze yard at night?
A. During the three years?
Q. Yes.
A. I wouldn't want to say. A good many times.
Q. Just figure it as near as you can; how many times would you say, as near as you can, you were out there in that yard, at night time?
A. I wouldn't attempt to say.
Q. How many times? Was it five?
A. Many more than that.
Q. Twenty-five?
A. Yes, sir; more than that.
Q. How many?
A. I would say over one hundred times at night.
Q. One hundred times in three years?
A. Yes, sir.
Q. When you would go there where would you go—where would you go when you were there?
A. I would usually go up to the office or out to the leads in the yards, watching the tracks.
Q. You would go to the yardmaster's office, would you?
A. As a general rule I would go there first.
Q. How long would you stay there, ten minutes or three hours?
A. It would depend on how much business I had to transact with them.
Q. Do you think you were ever there as long as an hour at any one time?

A. Yes, sir.

Q. What hour of the evening were you ever there?

A. I wouldn't want to say exactly, but I used to drive out after I got home, about 7:30 or 8 o'clock in the evening.

[fol. 201] Q. So all you know about what was done there, that you know yourself, was from the times that you were out there in the three years that you were superintendent of terminals?

A. Yes, from what I saw.

Q. How many times do you think you ever saw these two trains, 21 and 27, made up?

A. That was my principal object in being out there; probably one hundred times, if the other answer is all right.

Q. You think every night you were there you watched them make up those trains?

A. Yes, sir.

Q. What other trains did you watch them make up?

A. As a rule we didn't run any other train at that time in the evening.

Q. What was there about the making up of those two trains that took you out to watch them?

A. Because they were our high-class time freights and we were particularly interested to see that they moved all right.

Q. What did you do? Just stand around there?

A. I figured everybody would be doing business——

Q. What did you do?

A. I just stood around the lead.

Q. Don't you know, as a matter of fact, that you probably never saw them making that train up a dozen times in your life—putting these cabooses in there?

A. What is that question?

Q. Don't you know, as a matter of fact, that you did not watch them make those trains up a dozen times in your life?

A. Oh, yes I did.

Q. How long have you been with the Soo line?

A. Twenty-seven years.

Mr. Patterson: That is all.

[fol. 202] D. SMITH, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McInerney:

Q. Give us your full name, Mr. Smith?
A. D. Smith.
Q. Where do you live?
A. Schiller Park, Illinois.
Q. What is your occupation?
A. Railroad fireman.
Q. Employed by the Soo Line?
A. Yes, sir.
Q. How long have you been with them?
A. Four years and two months.
Q. What did you do before that?
A. Worked for my father, on a farm.
Q. You have had four years of railroad experience?
A. Yes, sir.
Q. Have you been working in the Kolze yard?
A. Yes, sir.
Q. What work have you been doing? What engine have you been operating on out there?
A. Switch engines; transfer engines.
Q. What work were you doing on an engine?
A. Switching in the yards.
Q. Making up trains?
A. Making up trains.
Q. You were on this engine, 2651, the night that Joe Rock was injured, were you?
A. Yes, sir.
Q. You were firing that engine?
A. Yes, sir.
Q. You were shoving two cabooses——
A. Yes, sir.
Q. Is that right?
A. Yes, sir.
Q. Where did you get them from that night?
A. We got the cabooses off of the caboose track.
[fol. 203] Q. East of the depot?

A. East of the depot.

Q. And you proceeded south?

A. Yes, sir.

Q. Tell us the movement that you made.

A. We proceeded south and crossed over on to the northbound main, and then proceeded to shove the cabooses north over Irving Park boulevard.

Q. Did you keep going all the time or did you stop at any time in that movement?

A. We stopped to line back the movement—to line the switch.

Q. Where was the front of your engine with reference to Irving Park boulevard when you stopped that night? Do you recollect?

A. Just north of Irving Park boulevard.

Q. Just north of the north line of Irving Park boulevard?

A. Just north of the north line of Irving Park boulevard.

Q. You stopped for whom to line up the switch?

A. I couldn't say the switchman's name.

Q. But he was to go back and line up the switch you had just used to cross over?

A. Yes, sir.

Q. Did you see the Belt run that night?

A. Yes, sir.

Q. Where was the engine when you first saw it?

A. When I first noticed it, it was south of Irving Park boulevard.

Q. And opposite or beyond you?

A. South of our engine.

Q. Did you have occasion to observe the headlight on that engine or not?

A. No, sir, I didn't.

Q. You don't know whether it was bright or dim?

A. No, sir, I don't.

Q. You were on the east side of your engine?

A. Yes, sir.

Q. Proceeding north?

A. Proceeding north.

Q. And your engineer was on the other side?

A. He was on the west side.

Q. Did you see anything of this accident?

[fol. 204] A. No, sir.

Q. Did your train start up again?

A. After the accident?

Q. After the accident.

A. No, it stopped at Irving Park boulevard.

Q. It stopped at Irving Park boulevard?

A. Yes, sir.

Q. How far did you go, would you say, before you were stopped again?

A. I couldn't say exactly.

Q. Do you know how far the engine was north of you, the belt run engine, at the time you stopped?

A. No, sir, I don't; I couldn't see it.

Q. Have you participated, as a fireman, in a similar movement to this at the Kolze yard before?

A. Yes, sir. We did this every night.

Q. You did this every night all the time that you have been there?

A. No, sir; on that particular job.

Q. Beg pardon.

A. When I fired that particular job.

Q. How many times would you say you made that movement out there in the time you were there?

A. Well, possibly thirty.

Q. Did you observe the other engines when they were making the same movement? Did you take occasion to see that or were you busy somewhere else?

A. I was busy somewhere else.

Q. At the times you saw that movement tell us what was actually done with reference to protecting the rear end of the leading car, say after it crossed Irving Park boulevard, proceeding north.

Mr. Patterson: If he knows.

Mr. Mr. McInerney: If you know.

A. There never was any light that I know of.

Q. Neither a man nor a light on the leading car?

A. I never saw it.

[fol. 205] Q. After you crossed Irving Park boulevard. Did you ever work with Joe Rock in a movement like this, that you know of?

A. No, sir, not that I know of.

Q. You don't recall it?

A. No, sir.

Mr. McInerney: That is all.

Cross-examination.

By Mr. Patterson:

Q. Mr. Smith, your job was to fire that engine, to keep it in condition to move along, wasn't it?

A. Yes, sir.

Q. Just what the duties of the switchmen and train crew were, you don't know much about, do you?

A. No, sir. They worked on the engineer's side.

Q. So whether or not anybody rode those cabooses when they were being shoved in there, head-end-on these different nights and you were busy firing your engine, you don't know, yourself, of your own knowledge?

A. Not when I am firing the job.

Q. You don't know of your own knowledge?

A. I don't see them.

Q. I say, you don't know whether they do or not, of your own knowledge?

A. No, sir.

Mr. Patterson: That is all.

Redirect examination.

By Mr. McInerney:

Q. Is it a fact that you never looked at the rear end of that train when you were working on that road?

A. I looked back on my side.

Q. You are not always firing, are you?

A. No, sir.

Q. When you are not firing you look out.

A. Yes, sir.

[fol. 206] Recross-examination.

By Mr. Patterson:

Q. One of the reasons you look out, when you are going along, is because there is a path from those oil houses, where men cross, and you would be looking for men to cross there at any time, wouldn't you?

A. Well, men walk across there, but I have never noticed any path there.

Q. Any path?

A. They cross within a radius of 50 or 60 feet there, either way.

Q. Directly from the depot over there to the oil house there is a restaurant, a path the railroad employees use right along—not a path, but a route that they use right along there?

A. Men go across there.

Q. And you knew that the night that Rock was hurt, didn't you?

A. That men went across there?

Q. Yes.

A. Yes, I have seen men go across there.

Q. Were you keeping a lookout ahead on your side?

A. Yes, sir.

Q. Were you keeping a lookout ahead as you approached this place where these men crossed?

A. I was looking the way the engine was moving.

Q. And that was north, wasn't it?

A. Yes, sir.

Q. That is the head end?

A. Yes, sir.

Mr. Patterson: That is all.

George A. Gary, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

[fol. 207] Direct examination.

By Mr. McInerney:

Q. State your name, Mr. Gary?

A. George A. Gary.

Q. Where do you live?

A. Schiller Park, Illinois.

Q. Where do you work?

A. In the general yardmaster's office of the Soo Line; assistant general yardmaster the title is.

Q. How long have you been connected with the Soo Line at Kolze?

A. I have been eight years at Kolze; a little over ten years with the Soo Line.

Q. Where were you before you went to Kolze?

A. In the chief train despatcher's office at Fond du Lac.

Q. You have been assistant yardmaster how long?

A. A little over three years.

Q. Were you there in December, 1924?

A. Yes, sir.

Q. What did you do before you became assistant yardmaster?

A. I was a switchman, and before that I was chief clerk.

Q. In the Kolze yard?

A. Yes, sir.

Q. Do you recall the night that Joe Rock was injured?

A. Yes, sir.

Q. What kind of a night was that with reference to weather conditions? Do you recall?

A. Well, I do not.

Q. You don't recall that?

A. I don't recall exactly what the weather conditions were.

Q. Did you see the accident?

A. No, sir.

Q. Where were you when it happened?

A. In the office, up-stairs; in the office, at the switchboard, talking to the west end yardmaster.

Q. Talking to the west end yardmaster?

A. Yes, sir.

Q. On some business that you had with him?

[fol. 208] A. Yes, sir.

Q. When was your attention called to the accident?

A. One of the men—as I came down the stairs, to the waiting room, one of the men came into the depot and said that they had——

Mr. Patterson: I object to that.

Mr. McInerney:

Q. That is all you heard about it then?

A. Then, after it had happened.

Q. Now, are you familiar with the custom of protecting the rear end of cabooses in shoving movements in the yards?

A. Yes, sir.

Q. You know what this movement was? You have heard what it was?

A. They were shoving two cabooses, north of Irving Park boulevard, with the intention of kicking them into Track No. 2.

Q. To be later put into trains 21 and 27?

A. Yes, sir.

Q. Under these circumstances, north of Irving Park boulevard, is there a custom or practice with reference to protecting the leading car?

A. No, sir.

Q. There is a custom, isn't there? What is the custom?

A. North of Irving Park boulevard the man—what we call the head man, drops back of the engine to line the switches—to line the switches back for the main track. The rear man gets on what we call the cut, on the south end, and the cabooses or cars—they are handled the same as cars switching on the switching lead, and the foreman is at the switch to throw the switch if he desires to make another move.

Q. And that is the custom that has been in vogue there all the time you have been there?

A. Ever since I have been there.

[fol. 209] Cross-examination.

By Mr. Patterson:

Q. Where is your office?

A. My office is down-stairs, on the east side of the depot.

Q. That is east of the track?

A. The northeast corner, but I have the agent's office, upstairs, and for telephone service I very often go to the switchboard, when the clerks are busy, and do my telephoning myself, work the switchboard myself.

Q. As night yardmaster what was your duty there December, 1924, and before that?

A. To supervise the east end of the yard, and also work in conjunction with the west end of the yard as to handling of trains pulled in, east and west, into the yard; the making of the time freights—not the making of the time freights; I would say I am in constant communication with the west

end man, giving the consignees of these trains, in order to make up the time freights, and answering whatever telephone calls there are there, and I instruct the switchmen what moves or what switches—what moves to make; give them their instructions.

Q. They come in and get their orders?

A. They come in and get their orders.

Q. About 98 per cent of your work is done inside of your office?

A. No, I have occasion, very often, to go into the yard, in fact I would say about fifty-fifty.

Q. About half of the time?

A. About half of the time in and about half of the time out. Some nights I am in more than other nights, and other nights it is the other way.

Q. If there were an engine and two cabooses standing north of Irving Park boulevard, just north of the crossing, and started up in order to make a kick of these cabooses, and kicked them down two or three hundred feet on to Track 2 where there are cars standing, would you handle [fol. 210] those cabooses just exactly as you would handle box-cars?

A. It depends exactly on how close the cars are to the track and how much room there is on the track.

Q. Those two trains, 21 and 27, are your two time freights?

A. Yes, sir.

Q. They are long freights, invariably, aren't they?

A. Very seldom over fifty cars.

Q. How many cars will Track 2 hold?

A. Seventy-six.

Q. If you have fifty cars in that track and start up the engine and have two cabooses north of the engine, when that engine is standing on Irving Park boulevard, north, and intending to kick in on to track 2, you mean to tell us you would handle those two cabooses the same as you would handle box-cars?

A. The same as if I was handling them on the track.

Q. The same as if there was nothing on the track?

A. I don't understand your question exactly.

Q. You would handle those two cabooses the same as you would handle box-cars?

A. It depends——

Q. No; I put the facts to you; did you handle them the same as box-cars, after the facts that you have stated.

A. Under the same circumstances we would.

Q. That is true whether there are men sleeping in those cabooses or not—whether or not there are men in them doesn't make any difference?

A. It is all a matter of the foreman's discretion.

Q. Does it make any difference whether there are men in them or not men in them?

A. I don't understand your question.

Q. What is it you don't understand?

A. Whether there are men in the cabooses—you ask, for [fol. 211] instance, if there are men in the cabooses. I don't get what you mean.

Q. If there were men in the cabooses you would kick them in there without anybody riding them?

A. We would kick them, depending on the distance, one car length or ten; it depends on the distance those cabooses or cars had to travel at different speeds.

Q. If there were fifty cars on that track and the train was made up, except the caboose not coupled up yet, do you mean you wouldn't have somebody ride that caboose in there at night time to control it until it got down on that switch off of the lead?

A. If there were fifty cars in the track and that caboose was—if the train was made up they would shove down and couple the caboose on.

Q. I didn't ask you anything about that. If you were kicking in there——

A. Certainly I would kick them in there.

Q. Do you mean you wouldn't have a man on the head end of that caboose, going in on that track, to regulate its movement?

A. At no times on the head end of the caboose. If a man rode it at all he would be on the rear end.

Q. I mean on the rear end; the head end as you go in?

A. That is up to the foreman's discretion and the room in the track.

Q. The fact that it is night time and there are no lights down there in the yard, and you go to kick two cabooses off of the lead into switch No. 2, where the train is ready, do you say you wouldn't have a man riding that caboose, the foremost end of it, as it went north?

A. Not necessarily.

Q. What do you mean by "not necessarily"?

A. It depends on where the cars are. If there are fifty-six cars and there is room, it is up to his discretion, where he wants to stop that caboose.

[fol. 212] Q. Do you think you could see in the night time north of Irving Park boulevard, into switch No. 2, so as to be able to tell where the cars are?

A. We know that before we put the cabooses in.

Q. You haven't any personal feeling in this case, have you?

A. No, none whatever. I say we know that. We don't attempt anything like that unless we know where the room is.

Q. Who do you mean by "we"?

A. When I was handling them myself, switching cars.

Q. And the fact that there are dozens of men crossing and re-crossing those tracks—that doesn't make any difference about where they are kicked?

A. We shove the caboose down—

Q. Answer the question. The fact that you are passing that way or path, where dozens of men cross and re-cross in front of that depot, in front of the oil house, and you are shoving two cabooses along there—the fact that dozens of men cross and re-cross there in the night time——

A. They cross and re-cross at different places.

Q. (continued). Would that make any difference in having a man ride the front caboose?

A. There are dozens of places where they cross there.

Q. Would that make any difference under the facts that I have given to you?

A. That depends on whether anybody was crossing at the time.

Q. Will you answer? Does it make any difference?

The Witness: State your facts.

The Court: Read the question.

(The pending question was read by the reporter.)

Mr. McInerney: I object to the question.

The Court: Objection overruled.

To which ruling of the court the defendant, by its counsel, [fol. 213] then and there duly excepted.

The Court: Answer the question by yes or no, if you can.

Mr. Patterson:

Q. If you are shoving two cabooses from a standing position, just north of Irving Park boulevard, down along the lead at night time—two cabooses in front of the engine, and if you are crossing over a path or way there that dozens of men cross and re-cross, would that fact make any difference to you in handling those cabooses as to whether or not you should keep a lookout from that most northerly caboose?

Mr. McInerney: I object to that unless it is limited to employees of the railroad.

Mr. Patterson: Yes, employees.

Mr. McInerney: Crossing men or employees of the railroad.

Mr. Patterson: That is what I mean.

A. I would first look if there was anybody—

The Court: That question you can answer yes or no, or say you can't answer it; one of the two.

A. I would say no.

Mr. Patterson:

Q. As a practical railroad man you would handle those cabooses, over such a place where men cross and re-cross, without having any lookout on the most northely caboose, knowing that men may be crossing there at any time?

A. I wouldn't say no, that they had no business to cross there without taking their own precautions.

Mr. Patterson: I ask to strike out that answer.

The Court: Strike out the answer as not responsive. Do you understand the question?

Mr. McInerney: I object. He has answered that question.

The Court: He may answer by yes or no.

[fol. 214] To which ruling of the court the defendant, by its counsel, then and there duly excepted.

A. No, not in such a place.

Mr. Patterson: That is all.

JOHN J. BURNS, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McInerney:

Q. What is your name?
A. John J. Burns.
Q. Where do you live?
A. 3119 Flournoy street.
Q. What is your occupation?
A. Chief clerk of the superintendent—
Q. Of what?
A. Of the Soo Line railroad.
Q. You were Mr. Simpson's chief clerk in October, 1923, were you?
A. Yes, sir.
Q. Do you know Joe Rock, sitting here?
A. Yes, sir, I have seen the gentleman.
Q. What was the occasion of your meeting him?
A. When he hired out, around October 18—
Q. 1923?
A. Yes, sir.
Q. What did you have to do with it?
A. I gave him an application and brought him in to see the superintendent, to see if he was O. K., and sent him to the doctor for an examination.
Q. What else did you have to do with him? Did you give him anything else?
A. Yes, sir, I gave him a book of rules and he signed for that book of rules, 7997, on the 21st day of October, 1923.

Mr. McInerney: I ask that this document be marked de- [fol. 215] fendant's exhibit 2 for identification.

Thereupon a certain document was marked defendant's exhibit 2 for identification.

Q. I will ask you to look at defendant's exhibit 2 for identification and state whether or not that bears your signature?
A. Yes, sir, that is my signature.
Q. Does it bear the signature of John J. Rock, the plaintiff in this suit?
A. Yes, sir.

Mr. McInerney: I offer this in evidence, if the court please.

Mr. Patterson: When did he say he gave him this, on the date it bears?

Mr. McInerney:

Q. Did you give it to him on the date it bears?

A. Yes, sir, on the 21st of October, 1923.

Mr. Patterson: My objection is that it has no bearing on the case.

The Court: I have not had a chance to look at it. You have one witness on the stand, however, at this time. Let us dispose of one at a time.

Mr. McInerney: This is offered in evidence, your Honor.

The Court: But you are at the same time examining the witness. Dispose of one witness at a time.

Mr. McInerney: Does the Court want to rule on this at this time?

The Court: If you insist upon it at this time. Objection sustained.

To which ruling of the Court defendant, by its counsel, then and there duly excepted.

Mr. McInerney:

Q. What book of rules did you give the plaintiff?

[fol. 216] A. 7997 was the number of it, the same thing as this—

Mr. McInerney: I ask that this be marked defendant's exhibit 3 for identification.

Thereupon said book of rules was marked defendant's exhibit 3 for identification.

Q. Was book 7997 the same as defendant's exhibit 3 for identification?

A. Yes, sir. Book 7997 is still outstanding. It has not been turned in as yet.

Q. Did you have any conversation with the plaintiff at the time you gave him this book and took his receipt?

A. I gave him the book of rules and he was to study them and write an A book.

Q. What is an A book?

A. An A book is an examination taken by train despatchers, conductors, engineers and switchmen, on the operating rules in effect May 1, 1912, such as you hold in your possession there.

Q. Were the rules in this book, defendant's exhibit 3, in effect on December 31, 1924, and prior thereto?

A. Yes, sir.

Mr. Patterson: I object to that. How does this man know that?

The Court: Objection sustained.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

A. Yes, that is—

The Court: Wait a minute, Mr. Witness. No question is asked you now.

Mr. McInerney:

Q. Were these rules in effect on October 18, 1923?

A. Yes, sir.

Mr. McInerney: I offer in evidence defendant's exhibit 2 for identification.

[fol. 217] The Court: It has been offered once; objection was made to it and objection sustained.

Mr. McInerney: I re-offer it now.

The Court: The same ruling.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. McInerney: I offer in evidence Clause C of the General Rules, appearing in defendant's exhibit 3 for identification; Rule 24, appearing in the same document, and Rules 102 and 102-A.

The Court: Any objection to that?

Mr. Patterson: Yes, I object to them, because they have no bearing on the case. There are rules of various kinds in there. We are not relying on any rule or any breach of any rule in this case.

Mr. McInerney: I am.

Mr. Patterson: And, again, my other objection is that it

is apparent that at the time of this examination—if that is what counsel is getting at—the physical examination—the plaintiff did not have any rules in his possession.

Mr. McInerney: I don't care anything about the physical examination. I am speaking about whether he knows what is happening in the yards when they are pushing cabooses, or should know it.

Mr. Patterson: The fact that it is in the rules does not prove custom.

Mr. McInerney: But I have a right to introduce rules covering the same practice. His evidence is contrary to the rules.

The Court: Do you want to finish with this witness?

Mr. McInerney: Yes, sir.

The Court: Better do it.

[fol. 218] Mr. McInerney: I have finished with him.

The Court: Cross-examine. Do you object to all of these, Mr. Patterson—102 and 102-A?

Mr. Patterson: No, I will not object to these.

The Court: You are now offering Clause C, Rule 24; Rule 102 and 102-A?

Mr. McInerney: Yes, sir.

The Court: Is there any objection to each and all of any of them?

Mr. Patterson: I think at this time I should note an objection.

Mr. McInerney: Then I will ask your Honor to reserve your ruling on that for the present.

The Court: I am ready to pass on it. The objection is overruled. Each is admitted. The jury determines all questions of fact.

Thereupon said defendant's Exhibit 3 for identification was received in evidence and was marked Defendant's Exhibit 3, which is in words and figures following:

[fol. 219] Mr. Patterson: May I ask the witness a question?

The Court: Yes.

Cross-examination.

By Mr. Patterson:

Q. Mr. Burns, are you the custodian of the rules?

A. Yes, sir.

Q. They are kept by you, are they?

A. Yes, sir.

Q. You remember that Rock came to you about the first of October?

A. No, sir.

Q. He did not?

A. No, sir.

Q. How many times did he come there and apply for work?

A. I don't recall how many times. He was hired on October 18, 1923, and five days later he was furnished with a book of rules.

Q. He was there, also, October 1, 1923?

A. I don't recall.

Q. Will your records show?

A. No, sir, not unless he was hired.

Q. You don't keep any record of employees who have come there and applied and who may be rejected? You don't keep a record of that at all?

A. Not until they are hired and pass the physical examination.

Mr. Patterson: That is all.

OFFER IN EVIDENCE

Mr. McInerney: That is all.

General Rules, Clause C, admitted in evidence, provide:

"Employees must pass the required examinations."

[fol. 220] "When cars are being pushed by an engine, except when shifting or making up trains in yards, a white light must be displayed on the front of the leading car by night."

Rule 102 provides:

"When cars are pushed by an engine, except when shifting and making up trains in yards, a flagman must take a conspicuous position on the front of the leading car."

Rule 102-A provides:

"Trains or cars must not be pushed over streets or public crossings, highways or electric or steam railway crossings at grade, unless a member of the crew is on the leading car, or on the ground ahead, to see that the crossing is clear, irrespective of other protection. No car containing passengers or employees must be switched unless coupled to the engine and air brakes in use."

Mr. Patterson: I move to strike out the rules so read, on the ground that they are not material and that they do not have any bearing on this case.

The Court: Motion denied.

To which ruling of the Court the plaintiff, by his counsel, then and there duly excepted.

(A short recess was then taken.)

[fol. 221] JOHN D. FITZGERALD, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McInerny:

Q. State your name?
A. John D. Fitzgerald.
Q. Where do you live?
A. Schiller Park, Illinois.
Q. What is your occupation?
A. Switchman.
Q. By whom are you employed?
A. The Soo Line Railway Company.
Q. How long have you been a switchman for the Soo Line?
A. October 11, 1909, to April 1, 1920, on the Milwaukee.
Q. Do you mean the Soo Line?
A. Yes; that is on the Milwaukee, November 9, 1921, until the present date.
Q. Have you been engaged in switching movements at the Kolze yard?

A. Yes, sir.

Q. You were in this crew that shoved those cabooses the night Joe Rock was injured?

A. Yes, sir.

Q. What did the crew consist of?

A. Engineer and fireman, conductor, another helper and myself—five men.

Q. Who was the conductor, do you recall?

A. Otis Hudson.

Q. Who was the other man?

A. Harry Cutler.

Q. You were the other man?

A. Yes, sir.

Q. What were your duties and Cutler's duties that night?

A. Cutler and the foreman went in to get the cabooses and I was to stay out at the main line switches and to protect them until they came out with them, and then we crossed over and went back into the yard.

[fol. 222] Q. You protected all the switches—look at defendant's exhibit 1—all of the switches encountered from the track east of the depot, south-bound?

A. Yes, sir.

Q. Down along until you got to the main line?

A. Including the main line.

Q. And then started back and took care of all the switches from that point to Irving Park boulevard?

A. Yes, sir.

Q. Did your train come to a stop at Irving Park boulevard?

A. We slowed down and the train did stop until I throwed the switch behind.

Q. What switch are you referring to? Point it out on this map.

A. Referring to the switch that comes off of the main line into the yard.

Mr. Patterson: We can't hear you.

The Court: It is important for the jury to get this.

Mr. McInerny: Point out on this map the switch you refer to.

A. This is the east-bound, is it not? (Indicating on defendant's exhibit 1.)

Q. Yes.

A. Well, we crossed from the east-bound main to the west-bound main, and we come into the yard and I throw all the main line switches back, and they stopped after getting over Irving Park boulevard until I lined them up.

Q. You lined all of them up?

A. Yes, sir.

Mr. Patterson: He means behind.

The Witness: Yes, sir.

Mr. McInerney: Q. You saw that all of the switches were right and then lined them?

A. Yes, lined them and then locked them back of the train.

[fol. 223] Q. Your engine came to a halt at the north line of Irving Park boulevard while you were doing that job?

A. Yes, sir.

Q. Did you see the belt run that night?

A. Yes, I did.

Q. Where was it?

A. When I saw it, it was possibly twenty-five car lengths on the inbound lead.

Q. Which way?

A. South of Irving Park boulevard, when I first saw it.

Q. Where were you then?

A. I was standing at the main line switches.

Q. Did you observe the headlight on that locomotive?

A. I did.

Q. What was the condition of it?

A. It was dim to the best of my knowledge. I am pretty sure it was dim.

Q. When you went back to your train what did you do?

A. We made the movement with the cabooses.

Q. What did you do when you went back and where did you go? What did you do yourself when you went back?

A. I got on the head end of the engine.

Q. On which side?

A. On the engineer's side, on the right hand side.

Q. You had finished your job?

A. Yes, sir.

Q. Then what happened?

A. Then Mr. Hudson gave a sign to kick them, and just about that time I noticed the lamp went out and I heard him holler. That is about the time we got this man, Mr. Rock, that was injured.

Q. You did not see Rock?

A. I did not, no.

Q. How far did your train go before Hudson gave them the washout signal?

A. The train, after it hit Rock?

[fol. 224] Q. No, before you got the signal?

A. Oh, possibly 20 feet.

Q. At that time do you know where the belt run engine was with reference to the rear caboose?

A. Yes, sir.

Q. Where was it?

A. It was just about even with the cabooses at that time, possibly leading them four or five feet.

Q. After the washout signal how far did they go?

A. They went about ten feet further; just about thirty feet.

Q. Then what did you do?

A. I run around to see what I could do to help him out. Hudson hollered to me, "We killed somebody." I said, "All right; where is he." He said, "I don't know."

Mr. Patterson: Never mind that.

Mr. McInerney:

Q. What did you do?

A. We went around the cabooses and found Mr. Rock in between the first and second cabooses. We went one car length and he lay in between the two cabooses.

Q. What did you do—did you go to the hospital?

A. I did.

Q. Did you go with him?

A. Yes, sir, and we put him in the caboose.

Q. Have you been on that particular movement?

A. I have.

Q. How often?

A. Working extra possibly a couple of dozen times a month.

Q. After your engine has come to the north line of Irving Park boulevard, the head of the engine, does he stop there every night while you line up the switches?

A. Yes, sir.

Q. That is the usual practice?

A. To always stop and pick up the head man.

[fol. 225] Q. What is the custom and practice as to whether or not you have a man on the head of the caboose, facing north, after you cross Irving Park boulevard?

A. It is always customary for a man to ride the head end of all cars—cabooses, on all trains, over railroad crossings and boulevards and street crossings. In that particular case we always ride them over that crossing.

Q. What happens after you make the crossing? Do you still ride them when you go to kick the cars in?

A. With one exception it is not necessary.

Q. What is the fact with reference to whether you do or not? What did you do on this night?

A. That is all according to how much room there is in the track.

Q. Do you know how much room there was in that track that night?

A. We figured about fifty car lengths of room.

Q. Assuming that there was fifty car lengths of room, what was the practice with reference to a man riding the rear end?

A. It would not be necessary.

Q. Has it been done around in the Kolze yard?

A. It has been done, but not in this case.

Q. I mean when there is fifty car lengths *feet* of leeway in the track on which you are going to kick the cabooses?

A. It is not necessary.

Q. What was done this night?

A. This night we didn't get to make the movement.

Q. Where was Cutler? Did you see Cutler?

A. Cutler was on the rear end of the cabooses, about ready to cut off, just a length ahead of me.

Q. Where was Hudson?

A. Hudson was at No. 2 switch.

Q. You were on the head of the engine, were you?

A. I was.

Q. What kind of a night was it? What were the weather conditions, if you recall?

A. Fair.

Q. What was on the ground?

[fol. 226] A. Ice and snow.

Q. How was the vision?

A. My length of vision was pretty good. I could see at least 35 or 40 car lengths.

Q. Could you see 35 or 40 car lengths ahead of your engine?

A. Oh, yes, indeed.

Mr. McInerney: That is all.

Cross-examination.

By Mr. Patterson:

Q. Mr. Fitzgerald, you do not know whether the headlight on that belt run engine that came in there was dimmed or not, do you?

A. I am almost positive it was.

Q. Why do you say "almost positive it was"?

A. Well, I wouldn't dare say—you couldn't flash it on and then put it out again—because I wasn't working with that crew. I was working with the crew in the yard.

Q. Why do you say you are almost positive it was dimmed?

A. It is customary to have them dimmed.

Q. You haven't any distinct recollection about that headlight that night, now have you?

A. Well—

Q. Yes or no,

A. No.

Q. Do you remember talking to Mr. Ray—Charles J. Ray—on the 12th of January, 1926?

A. Ray?

Q. At the lunch room, at the hotel, at Kolze?

A. I believe there was a man that came to visit me in that period of time. I am not sure.

Q. He talked to you about this accident?

A. Yes, he did. There was some one there; I am not sure whether Ray.

Q. You told him "it was the custom to dim these electric headlights when pulling into the yard, but whether or not this belt drag engine had its headlight dim, I could not say [fol. 227] that, as I did not notice." Did you tell him that?

A. I don't recollect telling anybody anything of the sort.

Q. Will you say you did or that you did not tell him that?

A. I would rather say that I did not tell him that.

Q. That is your answer to this question?

A. Yes.

Q. That you did not say that?

A. I would rather say I didn't.

Q. But now you say that you have no distinct recollection about that at this time?

A. Well—

Q. As to whether it was dimmed or not?

A. when I first saw—

Q. No; have you any recollection as to whether it was dimmed or was not dimmed?

A. When I first saw the light it was dim.

Q. You are sure of that?

A. I am positive of that. I was standing on the main line, in a position to know.

Q. You were busy throwing your switches and lining up, weren't you?

A. No; I am busy watching all the switches. I have to protect the men.

Q. Have you talked with anyone since you have been called as a witness here as to whether or not that headlight was dim or bright?

A. Oh, it has been discussed, but there was nothing said about that one way or the other.

Q. In what way was it discussed?

A. Whether it was dim or whether it was burning bright.

Q. And who did you discuss it with?

A. Oh, there was a party of two or three discussing it.

Q. Out here, in the hall?

A. Yes, sir.

Q. Have you talked to any of the other witnesses who [fol. 228] have testified in the room here?

A. No, sir.

Q. Have you talked with Mr. McInerney or anyone from his office about that?

A. No, sir.

Q. What?

A. No, sir.

Q. Did you all agree whether it was dim or bright when you discussed it?

A. I am pretty sure it was dim.

Q. No, but in this discussion you had –

A. No.

Q. Did you all agree on that subject?

The Court: Answer yes or no.

A. Yes.

Mr. Patterson:

Q. You did?

A. That is right.

Q. I would like to get, if I can, Mr. Fitzgerald, as near as possible, at the precise time that you saw this washout signal; where were you with reference to Irving Park boulevard?

A. Standing right at the boulevard.

Q. On the boulevard?

A. Right on the boulevard.

Q. On which side of that lead?

A. Just south of the boulevard, where the switch is located.

Q. Were you there south of the boulevard?

A. I was south of the boulevard, yes, sir.

Q. On which side of the lead, on the east side or the west side?

A. On the engineer's side—on the west side.

Q. About how far from there up to No. 2 switch?

A. How far is the distance?

Q. Yes.

A. I should judge about five car lengths.

Q. And you stood there at the time this happened.

A. I was on the head-end footboard.

Q. You had come up here and had gotten on the head-end [fol. 229] footboard? (Indicating on defendant's exhibit 1.)

A. Yes, sir.

Q. Where were you at the precise time this happened?
A. Right on the footboard.
Q. Did you see Hudson's washout signal yourself?
A. I did see it, yes.
Q. You saw it?
A. The lamp going— (Indicating on defendant's exhibit 1.)
Q. What else did you see?
A. What else?
Q. Was there anyone working there besides Hudson?
A. Cutler was on the job.
Q. He was in there—down there? (Indicating on defendant's exhibit 1.)
A. Yes, sir; he was ready to make the cut.
Q. Did the engine start north before you got on the footboard?
A. No, sir.
Q. It was standing, waiting for you?
A. Yes, sir; it was standing, waiting for me.
Q. Did you get the signal?
A. Yes, sir.
Q. How far did it go before you got the washout signal?
A. Possibly 25 or 30 feet.
Q. And Cutler was about ready to pull the pin?
A. Just about; maybe a little further than that, because the engine drifts when it starts.
Q. Isn't it a fact that you had gone a lot farther than that going to make a kick on Track 2?
A. No; we didn't go more than 20 feet from the time the engine started.
Q. Where was your engine standing when that belt drag passed you?
A. We were standing right on the boulevard.
[fol. 230] Q. That is when it passed you?
A. Yes, sir.
Q. And it was going pretty slow?
A. Yes, sir, it was going pretty slow. It was a little farther down than that when it passed me—farther north than that when it passed me.
Q. And when you kick these cars you get speed up on your engine and then the fellow that is pulling the pin gives a signal and the engine stops and the cars roll along?

A. Yes, that is it, if you cut them off.

Q. Are the tracks upgrade or downgrade there?

A. Level there.

Q. Did you see anyone down there throw a switch besides Hudson?

A. No, I did not.

Q. You could see Hudson plainly, could you?

A. I couldn't see him plainly, but I could see him.

Q. You could see a man down there?

A. That is on an angle of a curve.

Q. But aside from the curve you could see a man down there that night all right, could you?

A. Yes, sir.

Q. There are no lights in the yard north of Irving Park boulevard?

A. The switch lights; that is all.

Q. The headlight of the locomotive lit it up so you could see Hudson—see those switches, from the belt locomotive?

A. It would not be necessary to see—

Q. Well, did it?

A. It did not.

Q. Did you know, Mr. Fitzgerald, what track you were going to kick that foremost caboose on?

A. Yes; we were going to put them in on 2.

Q. Both of them?

A. Both of them. That was our intention.

Q. Are you sure about that?

A. That was the understanding.

[fol. 231] Q. Weren't you going to put the two cabooses out on separate tracks?

A. No, sir, not the way Mr. Hudson informed me. He was going to put both on Track 2.

Q. How many men were in those cabooses, if you know?

A. I can't say there were any.

Q. Do you know?

A. I am positive there wasn't anybody, because there was nobody in them when we started away.

Q. Did you make the coupling over there to them?

A. No, I didn't. I stood out——

Q. You were back on that engine all the time?

A. I stayed out on the main line switches while the two other men went and got them.

Q. You were not in those cabooses until after this accident happened?

A. Not until after this accident happened I didn't get on them.

Q. Was the air coupled up from the engine on those two cabooses?

A. No, sir, it was not.

Q. You knew many employees—men—crossed back and forth there to the depot?

A. Yes, indeed.

Q. It is a sort of a regular passageway there, isn't it?

A. Well, there is no passageway, any more than you cross back and forth anywhere in there.

Q. Isn't it a fact that they cross more from that depot over to these oil houses and the restaurant than any other place around there?

A. Well, in that immediate territory, yes, that is right.

Q. And passing over that particular territory or strip wasn't it the custom and practice to have someone keep a lookout on that most northerly caboose shoved along there?

A. We were about to make a switch movement—no, it is not customary, because everybody protects themselves, going across there, all of the employees, the section men and rip men.

[fol. 232] Q. You never saw anybody ride the cabooses up along that lead track?

A. I have seen it done.

Q. You had seen it done before this accident, when they were handling cabooses going in trains there?

A. No, sir, I have not.

Q. How often have you seen it done?

A. I have seen it done more times when they would kick them in than when men would ride them.

Q. How many times did men ride them?

A. When they were to be hauled to Kolze, then they would pick them up, in the train to be made up.

Q. Which side of the engine was Cutler on?

A. He was on the west side, the same as myself.

Q. Was he in between at the time that this happened, or do you know?

A. I believe he was in between the engine and the head caboose.

Q. There was nobody on the north end of these cabooses?

A. Not at that time.

Q. Who rode the cabooses over the crossing?

A. Cutler.

Q. Did you see him?

A. Yes, he passed me.

Q. Now, which trains were these cabooses to go on? What are the numbers of them?

A. 27 and 21.

Q. They are not put over there until these trains are assembled on the different tracks, are they?

A. Yes, we take them over there so they will be ready when the train comes from the south, better known as "the merchandise." They put the fill in and they shove down and after we get information to couple the caboose on we shove up there.

Q. Do you mean you put the caboose on the track before the train is made up?

A. Oh, yes.

[fol. 233] Q. Even though you want to switch at that track?

A. We don't use that track any more. The train is all built up at the north end of the yard.

Q. It is built up at the north end of the yard and shoved down?

A. Yes, sir.

Q. Why were there two on the one track?

A. You can shove one and put it on to the train and clear the other and leave it. That is customary.

Q. Was there any light on the north end of these cabooses that you know of?

A. Mr. Cutler had a light when they went over the boulevard.

Q. At the time of the accident?

A. At the time of the accident I can't say there was.

Mr. Patterson: That is all.

Redirect examination.

By Mr. McInerney:

Q. What time of night was this?

A. I can't just recall, but something between 7:30 and 7:45, I should judge.

Q. What time are trains 21 and 27 made up?

A. Their time is 8:20 and 8:35, if I remember. Leaving time, you mean?

Q. Leaving time on that date?

A. I am not altogether sure of that, but I think that is right.

Mr. McInerney: That is all.

Harry Cutler, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McInerney:

Q. Give your full name?

A. Harry Cutler.

Q. Where do you live?

A. Schiller Park, Illinois.

Q. What is your occupation?

[fol. 234] A. Switchman for the Soo Line.

Q. How long have you been with them?

A. Six years.

Q. At Kolze yard?

A. Yes, sir.

Q. What did you do before that?

A. I was switching on the Northwestern.

Q. Where?

A. At Fond du Lac, Wisconsin.

Q. How long have you been a switchman altogether?

A. Well, about seven years switching and five years on road service.

Q. Before that?

A. I broke on the Soo Line.

Q. You were on this run that took cabooses off of the caboose track, east of the depot, on the night of December 31, 1924?

A. Yes, sir.

Q. About what time of night was that movement made?

A. Seven-fifty.

Q. What kind of a night was it? How was the weather?

A. It was a mild night, I guess.

Q. Was it clear?

A. Clear, yes.

Q. Your crew consisted of what that night; how many men did you have?

A. Five men—three; the switchman, engineer and fireman.

Q. Who were the engineer and fireman?

A. George Ourado and D. Smith.

Q. Who was the other?

A. Otis Hudson, conductor, Fitzgerald was the head man and I was the rear man.

Q. What did you do when you first went to get the cabooses? What did you have to do with them? Start at the beginning?

A. When we come back from supper? Is that what you mean?

Q. Yes, what did you first do in this movement?

A. We came back from supper and went back into the depot. I got the cabooses——

[fol. 235] Q. What did you do yourself?

A. Shoving off from the south-bound main yard I rode the leading caboose over into Irving Park boulevard——

Q. Before your engine hooked up with those cabooses did you have anything to do with getting them ready to take them off of the caboose track?

A. No, sir.

Q. Were they all ready when you came to them?

A. Yes, sir.

Q. Did you examine the cabooses that night to see if there was anybody in them?

A. No.

Q. Do you know whether there was anybody in them or not?

A. No; there was nobody in them.

Q. Where did you ride proceeding south on Irving Park boulevard?

A. On the rear caboose.

Q. Did you have a light in your hand?

A. Yes, sir.

Q. What happened then? You proceeded south and backed up?

A. Backed up off of the south-bound into the yard. I rode the leading caboose into Irving Park boulevard, and we stopped there to have Fitzgerald line the lead switch back.

Q. Did you carry your lantern across Irving Park boulevard?

A. Yes, sir.

Q. When your leading caboose got across the north line of Irving Park boulevard what did you do?

A. I got off at the road crossing, on the north side of the road crossing.

Q. What did you do?

A. The conductor gave a sign and I got one foot about on the footboard of the engine and the other on the caboose to pull the pin.

Q. Did your train come to a stop there?

A. Yes, sir, we stopped dead still for Fitzgerald to line the lead switch back.

[fol. 236] Q. At that time where was Hudson?

A. Hudson was standing about at No. 2 switch.

Q. Did you see this belt line run that night?

A. Yes, sir.

Q. Did you see an engine on it?

A. Yes, sir.

Q. Where was it when you first saw the engine?

A. Well, at that crossover switch, from the main line to the yard. We were working along together.

Q. How far south of Irving Park boulevard, approximately, would that be?

A. 200 feet.

Q. Did you see the headlight on that engine?

A. Yes, sir.

Q. What was the condition of it?

A. Dim.

Q. Did you see it again?

A. Yes, sir.

Q Where were you when you next saw the headlight of that engine?

A. On the other—on the north side of Irving Park boulevard.

Q. Where was the engine then?

A. About opposite—it was about opposite me.

Q. About opposite you?

A. Yes, sir.

Q. Where were you then?

A. I was just on the north side of Irving Park boulevard.

Q. On the rear car?

A. No, sir; I was standing on the ground.

Q. What was the condition of the headlight then?

A. It was dim.

Q. Now, did your train start again after it stopped there?

A. Yes, sir.

Q. How far did it go before it stopped?

A. Thirty feet—forty feet.

Q. And then came to a stop?

A. Yes, sir.

Q. And at the time it stopped where was the engine of the belt run with reference to the rear caboose?

A. About parallel of—our engine was about parallel of [fol. 237] the locomotive on the belt run.

Q. When you stopped?

A. Yes, sir. It was either the engine or the first caboose; I couldn't say right exact. They were close together there.

Q. Did you see Joe Rock that night?

A. Yes, sir. I took Mr. Rock to the hospital.

Q. Did you see him before he was hurt?

A. No, sir.

Q. You didn't see him cross and didn't see anything until the accident happened? Is that right?

A. I see a flash of the lantern from the new lead to the old lead—Mr. Rock.

Q. That is all you saw?

A. That is all I saw, just the flash of a lantern.

Q. Did you see the signal from Hudson?

A. Yes, sir.

Q. What was it?

A. He gave a stop sign and his lamp went out.

Q. How many times have you been on this particular run?

A. Oh, I should say six years, I have been there a year and a half straight.

Q. Doing this particular job every night?

A. Yes, sir.

Q. What is the practice with reference to protecting the rear end of the caboose after you cross Irving Park boulevard there?

A. Well, if you are putting in on a track that is clear, you have the privilege of kicking in or shoving in, according to the move you are making.

Q. Without rear end protection?

A. You don't need any.

Q. Was the track clear that night?

A. No, I think they had 30 or 40 cars at the north end of the yard.

Q. How much leeway did you have?

[fol. 238] A. About fifty car lengths.

Mr. McInerney: That is all.

Cross-examination.

By Mr. Patterson:

Q. Mr. Cutler, when you went over to get the cabooses did you make the coupling between the tender and the caboose?

A. I can't say; I won't say yes or no.

Q. Wouldn't that be your job?

A. No, sir, not in one way it wouldn't.

Q. Do you mean you can't remember?

Q. I can't remember. Some times the head man stays out at the main line switch and lets the engine come back, and some times he comes back with it. So I really couldn't say.

Q. You have no idea whether you coupled on to these two cabooses that night or not?

A. No, I haven't.

Q. The cabooses were lighted up?

A. No, sir.

Q. No lights in them?

A. No, sir.

Q. You are sure of that?

A. Yes, sir.

Q. They are road cabooses?

A. Yes, sir.

Q. Do you know when they came in and were put on that spur over there?

A. No, sir.

Q. You handled that run a year and a half, you say?

A. Yes, sir.

Q. They are regular cabooses, way-cars, that go out with that train, aren't they?

A. Yes, sir.

Q. And those crews, a great many of them live in Fond du Lac, Wisconsin, do they not?

A. Yes, sir.

Q. And they sleep in those cabooses?

A. Some do and some don't.

Q. And they eat in there—some of them?

A. Some do and some don't.

[fol. 239] Q. That is true of both of those cabooses that you had that night?

A. No, sir.

Q. Just one of them?

A. Neither one of them. This man stayed at the beanery at the present time.

Q. I am talking about this night?

A. Yes, this night. Those men stayed at the beanery, the Leslie eating-house.

Q. How do you know that?

A. Because, when we cut the leg off of Mr. Rock——

Q. No, answer the question.

A. I am explaining why nobody was in the cabooses; because we went in to the register to see, and if there was we would have put Mr. Rock in some other caboose and taken him to the hospital.

Q. Do you remember one member of that crew, a tall, slim fellow, that worked as a brakeman?

A. Yes, Mr. Hill.

Q. Don't you know that he was in one of those cabooses?

A. He went in the caboose when we were tying Rock's leg up in the depot.

Q. Don't you know he was in the caboose when this happened?

A. No, sir.

Q. And he got out afterwards?

A. He got out because he asked what we were going to do and we told him.

Q. He was in the caboose?

A. He was in the caboose then, yes, sir.

Q. He was in the caboose when Rock got hit?

A. No, sir; he was going out on 27. He came from the beanery or wherever he was and got into the caboose.

Q. Did you see him do that?

A. I seen him do that? Do what?

Q. Do what you have said?

A. I seen him in the caboose and he asked what we were doing and I told him.

Q. You didn't see him come from the beanery and get in there?

A. No, I seen him wherever he was.

[fol. 240] Q. You didn't see him come and get in there, did you?

A. No, sir, I didn't.

Q. When you got in to take care of Rock he got out?

A. When we put Rock in the caboose he got out.

Q. You know, when you are handling cabooses like that, if there are men in them, the rules require you to have the air coupled up to the cabooses and not to move them until that is done?

A. No, sir, not in the Kolze yard.

Q. Don't you do that?

A. No, sir, not as long as I have been there.

Q. Don't you know one of the rules provide, when there are men in the cabooses, that you shall not kick those cabooses, but shall shove them?

A. No, sir.

Q. Don't you know that one of the rules in evidence here provides that no car containing passengers or employees must be switched unless coupled to the engine and air brakes in use?

A. No, sir.

Q. Will you say that is the rule and practice or not?

A. It is not our practice.

Q. So if this fellow, Hill—this tall fellow——

A. Yes, sir.

Q. (continued). If he was in that caboose, will you say that it was customary and in conformity to the rules for you to kick that caboose over the track?

Mr. McInerney: There is no evidence that Hill was in the caboose.

Mr. Patterson: I think there is from this witness.

The Witness: No, sir; I never said Hill was in that caboose at the time we cut the leg off of Rock.

Mr. Patterson:

Q. You are not interested in this case?

A. No, sir, not a bit.

[fol. 241] Q. You said when you got into the caboose to put Rock in, you found Hill in there?

A. Yes, sir. Hill told me he had just come to the caboose.

Q. Are you testifying to what somebody told you or what you know?

A. What I know and what he told me.

Q. Where is Hill?

A. Well, I suppose he is in Fond du Lac or wherever he is running out of. I don't know where he is working now.

Q. Now you have a distinct recollection that that headlight on that belt drag that night was dim?

A. Yes, sir.

Q. Was it dim on the last train that came in there just before this belt drag?

A. I don't know of any other train.

Q. Well, you remember that because you know that it is supposed to be dim; isn't that right?

A. Why, yes, on approaching a yard.

Q. It is supposed to be dim?

A. Yes, it is supposed to be dim.

Q. And that is what caused you to say that on this belt drag it was supposed to be dim?

A. No; I could see it. I was ten or fifteen feet from it right along.

Q. And you could see where Hudson was, see down into the yard from where you were?

A. I could see Hudson by his lamp.

Q. One other thing I would like to ask you about: You think, from the time you started up until you stopped, after starting from that place north of Irving——

A. Yes, sir——

Q. (continued). That you went thirty or forty feet?

A. About 30 or 40 feet, yes, sir.

Q. That is your best judgment about that, is it?

[fol. 242] A. Yes, sir, about that.

Q. And Rock was taken out from between the first and second caboose, wasn't he?

A. I think Rock crawled out himself.

Q. Yes, between the first and the second caboose?

A. Yes, sir.

Q. And a caboose is about 36 feet long, isn't it?

A. About that.

Mr. Patterson: That is all.

Mr. McInerney: That is all.

Whereupon a recess was taken until 2 o'clock, P. M., of this day.

December 20, 1926—2 o'clock, p. m.

Continuation after recess.

Present: As before.

Otis Hudson, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McInerney:

Q. State your full name?

A. Otis Hudson.

Q. Where do you live?

A. Franklin Park, Illinois.

Q. What is your occupation?

A. Switchman.

Q. By whom are you employed?

A. The Soo Line.

Q. How long have you worked for the Soo Line?

A. Since 1913.

Q. In what capacity?

A. Switching cars.

Q. Where have you been located in your switching of cars?

A. At Schiller Park, in the Chicago switching district.

[fol. 243] Q. How much of that time has been spent at the Schiller Park yard and at Kolze?

A. Practically all of it.

Q. What time do you work—what time have you worked during those years?

A. Well, I worked at various hours, on almost all shifts.

Q. You have worked on almost all shifts?

A. Practically all the shifts.

Q. You were on this run, this night, when they shoved the cabooses, or were about to shove them, into Track No. 2, were you not?

A. Yes, sir.

Q. Do you know the condition of Track No. 2 that night, north of the switch or the lead, as to whether or not it was occupied by other cars?

A. You mean the track north of the switch?

Q. Off of the switch lead, yes.

A. Well, there wasn't no cars in there as far as I know; if there was, they were back at the north end of the track.

Q. What investigation did you make of that before you made that movement, if any?

A. Well, I began working around there from 3 P. M. up until that time and I was familiar with the conditions.

Q. You were working on that track?

A. In that yard, yes, sir.

Q. How far was that track clear, north of the switch or the lead into Track No. 2?

A. Well, at least fifty car lengths.

Q. What kind of a night was December 31, 1924, the night that Rock was injured?

A. Well, the weather overhead was clear, but on the track was some ice and snow was on the ground. It was kind of slippery.

Q. Do you know the use that the employees of the Soo Line make of the right of way in going east or west on it, with reference to whether they use any particular point in going from the depot to the oil shanty or the beanery?

[fol. 244] A. No; there is no particular point they use. They cut across there at any point that they see fit. It depends on whether they are coming from the round-house or the rip track or the depot; they cut across which is the nearest way for them.

Q. With reference to the ice-house track, coming from the beanery, for instance, are there cars set out there—are there cars set out on that track at various times?

A. Yes, sir. That was known as the team track, from the corner of the ice-house up to Irving Park boulevard.

Q. And at times is that track blocked?

A. Yes, sir.

Q. When they do cut across there do they cut across at different places?

A. Yes, sir.

Mr. Patterson: I object to that. The only thing we are concerned with is the——

The Court: Read the question.

(The pending question was read.)

The Court: Your questions have been answered. Those answers may stand. I might suggest, the question is somewhat leading, but there is no objection for that reason. Go ahead.

Mr. McInerney:

Q. This night you took cabooses from the track east of the depot, didn't you?

A. Yes, sir.

Q. Who was in your crew working on that particular ground?

A. H. C. Cutler was what we call the hind man—the rear man, and Fitzgerald was the head man; the crew; two switchmen.

[fol. 245] Q. What were you?

A. I was the foreman of the crew.

Q. And you had your engineer and fireman?

A. Yes, sir, I had my engineer and fireman.

Q. What was the first thing that you did in connection with that movement, beginning at the track where the cabooses were parked, east of the depot?

A. Well, we went over and coupled on to these two cabooses and we started across. Fitzgerald stayed at the main line switch——

Mr. Patterson: I object to "we."

Mr. McInerney:

Q. Tell what you did in connection with the movement on that track, east of the depot, where they were parked.

A. I gave the signal to go ahead.

Q. Did you at that time examine those cabooses to see if there was any one in them?

A. Yes, sir.

Q. What did you find?

A. No one in them.

Q. You proceeded south, across Irving Park boulevard, on to the main line, and back over and shoved these cabooses northward across Irving Park boulevard, did you?

A. Yes, sir, northward across Irving Park boulevard; and Fitzgerald lining the switches behind.

Q. What was Cutler doing?

A. He was riding the rear of the cabooses until after the switches were lined up.

Q. What did he do on the rear end of the cabooses?

A. He stayed on the rear end of the cabooses until they were over Irving Park boulevard.

Q. Did he have a lantern in his hand?

A. Yes, sir.

Q. When you came to Irving Park boulevard, did you keep going or did you stop?

A. Stopped to line the switches behind us.

Q. Where were you then?

A. I was at No. 2 switch.

Q. Point out, please, on this map, where you were. (Indicating on Defendant's Exhibit 1.)

[fol. 246] Q. Referring to the switch, marked "No. 2" S. W."?

A. Yes, sir, this switch here. (Indicating on said exhibit.)

Q. From No. 1 switch track or from track No. 1?

A. This is No. 1, and we were coming down, putting those cabooses on Track 2. (Indicating on said exhibit.)

Q. In doing that you stood at that switch?

A. Yes, sir, I stood at that switch.

Q. What was your object in standing there?

A. To give signals and to line the switch back after the cabooses went in on that track.

Q. Was the switch against you? Had you thrown it?

A. I had thrown the switch for No. 2 track.

Q. You were going to remain there until they passed through?

A. Yes, and then throw the switch back to make our next move.

Q. Where were you in the train as it was coming over Irving Park boulevard?

A. I wasn't on the train coming over Irving Park boulevard.

Q. You went over ahead?

A. I went to line up No. 1 switch, which was wrong.

Q. How far south of you was the rear end of the caboose as you stood there when it was stopped?

A. Well, I would say about 75 feet.

Q. Did you see the Belt run engine at any time?

A. Yes, sir.

Q. Where was the Belt run engine when you first saw it?

A. At about Irving Park boulevard, I guess.

Q. Proceeding what way?

A. North.

Q. Did you observe the headlight on that engine?

A. I did.

Q. What was the condition of it?

A. Dim.

Q. Did you see it again after that?

A. Well, I didn't notice it after that, no. I noticed it [fol. 247] coming along, but not after.

Q. You didn't look particularly on it?

A. No, not after the accident happened, I didn't look at it.

Q. Did you look at it after it left the north line of Irving Park Boulevard?

A. I did.

Q. What was the condition, then?

A. It was dim.

Q. Now, what occurred there?

A. Well, after they had stopped at Irving Park Boulevard to line the switches up, it is the practice to cut those cabooses off; so I gave the signal——

Mr. Patterson: I object to that—the practice.

The Court: Objection sustained.

Mr. McInerney: Never mind what the practice was. Tell what occurred.

A. I gave the signal to cut those cabooses off, and a signal to kick the cars in, and in the meantime I seen a man with a lamp dart across in front of the engine coming in on the opposite track and in behind the cabooses that we were shoving, and he was knocked down and went under.

Q. Where was that man when you first saw him with reference to No. 2 switch? That is where you was standing, is it?

A. Yes, he was coming across in front of 2446 on the opposite track.

Q. How far in front of the engine was he when he crossed that track on which the Belt run was coming?

A. I will say 10 or 15 feet.

Q. Can you indicate on this map where the cabooses were when he attempted to cross?

A. I can show you where he was hit. He was hit at this crossing here. (Indicating on defendant's Exhibit 1.) That is where they picked him up.

[fol. 248] Mr. Patterson: Indicating north, No. 2 switch, an inch or an inch and a half. (Referring to defendant's Exhibit 1.)

Mr. McInerney:

Q. Where was he, south or north of you?

A. He was south of me.

Q. You were at No. 2 switch—that is, No. 3 switch? (Indicating on said exhibit.)

A. Beg pardon. I was here and this is the crossover where he was (indicating on said exhibit).

Q. Indicating a point between No. 1 switch and No. 2 switch, where there is a frog shown by cross lines? Is that right?

A. That is it. That is the place where we picked him up.

Q. Is that the point at which he ran across in front of the switch-head?

A. Well, I think it was, because he wasn't dragged—he wasn't drug as I know of.

Q. How far did you see him go?

A. Well, he was west of the adjoining track when I first noticed him.

Q. What was he doing?

A. He was running.

Q. How was he facing?

A. East.

Q. Did you observe him from that time to the time he was struck?

A. I did.

Q. Did he make any change in his position, or what was he doing?

A. No, he kept right along.

Q. Did he look to the south or to the north?

A. I couldn't tell whether he did or not. It was dark and I could only see his lamp and the outline of a man.

Q. How far did the cabooses go after they had started, before you gave him the signal to stop?

A. You mean after we hit him?

Q. After you stopped—you stopped first at Irving Park Boulevard to get the switches lined up.

A. I presume they had probably gone thirty or forty [fol. 249] feet.

Q. Where was the front end of the Belt line run with reference to the rear of your last caboose at the time that this man was struck?

A. Just about the rear end of our cabooses.

Q. How many times have you participated in such a run as this, that is, backing the cabooses into that track?

A. Well, every night when I was on that job. I suppose I was on that job a year or a year and a half; that is, every night I was working.

Q. Do you know what the usual and customary method was of handling that movement, with reference to whether the lead caboose, that is, the head end of the front caboose,

being pushed or protected by a man with a light, or not, at night? If so, under what circumstances?

A. Only on the main line and over the boulevard it was protected. Then sometimes he would ride the caboose in, if we wanted to shove them in, and at other times he would get off and we would kick them in.

Q. Did a kick-in mean the rear end was not protected?

A. No, sir.

Q. What was Cutler doing this night?

A. This night?

Q. Yes, after he got off at the Irving Park Boulevard crossing.

A. After he stopped at Irving Park Boulevard I gave a signal to kick them and the engineer moved up slow until he got to just about the place he wanted to get on, that is, between the engine and the two cabooses; then he got on and he taken my signal and he began to increase speed at that time. Just about the time he started to increase speed this man run across and I gave him a violent signal to stop, and he taken the signal and Cutler didn't cut them off.

[fol. 250] Q. How fast would you say your train—the cabooses went, from the time it started until it stopped—how fast per hour?

A. I would say, maybe, six miles an hour.

Q. How fast was the Belt Run going?

A. A little slower than we were—four or five miles an hour. We had increased speed, gone on and overtaken him a little bit, you see.

Cross-examination.

By Mr. Patterson:

Q. Mr. Hudson, after you had gone over on the spur track, east of the depot, and coupled on to these two cabooses, where did you go?

A. I walked across to No. 1 switch, west of the depot.

Q. When you got these two cabooses, were they as far north as the depot?

A. They were farther north than the depot.

Q. Up in here some place? (Indicating on defendant's exhibit 1.)

A. Yes.

Q. Did you make the coupling yourself?

A. If I didn't I was there when it was made. I am not positive whether I made the coupling or not.

Q. Then you walked straight across No. 1 switch?

A. No, sir, I walked diagonally across, by the depot.

Q. Here is number 2. (Indicating on defendant's exhibit 1.)

A. I walked to No. 1 first.

Q. And you threw that switch?

A. Yes, sir.

Q. You don't know anything about these movements, when they pulled back south and over on to the crossover, on to the other main and in here at all? (Indicating on said exhibit.)

A. I was across to No. 1 switch before they got to the main line switch and I watched the men to see if everything went all right.

Q. But as to who did this, that or the other thing you [fol. 251] don't know of your own knowledge, do you?

A. I know who was on the rear end of the caboose backing up.

Q. When it got up towards you?

Q. Because there were only two other men on the crew.

Q. It was one of those two that did that work?

A. I know it was Cutler.

Q. It was one of the two that did that work?

A. Two of them.

Q. When you testify to what you saw done here you are testifying to something that you didn't see, but you answer that way because it is customary to do so-and-so? Isn't that right?

A. I didn't testify that I seen anything on the main line. I testified that the engine coupled onto the cabooses, and I give a signal to go ahead and they went and come back to the cross-over up to Irving Park Boulevard, and from there I could see what was going on.

Q. Yes, but whether Cutler threw a switch done here, or Fitzgerald did that, you don't know of your own knowledge, do you?

Mr. McInerney: He didn't testify to that.

A. Not on the main line. That is 500 feet.

Mr. Patterson:

Q. So, when you threw No. 1 switch, you started to walk to No. 2?

A. I threw No. 1 switch and walked north to No. 2, and was standing at No. 2 switch.

Q. That is about 100 feet between those two switches, isn't it?

A. I will say 75. I don't know. I never measured it.

Q. Had you gotten up to No. 2 switch before the engine stopped north of Irving Park Boulevard?

A. Yes, sir.

Q. How long did the engine stand there?

[fol. 252] A. Just long enough to line a switch. It takes about three seconds, I suppose.

Q. You think it stopped altogether about 3 seconds?

A. Probably.

Q. Do you think it stopped at all?

A. I know it did.

Q. And then you gave them the signal to kick, did you?

A. Yes, sir.

Q. And the engine started up?

A. It did.

Q. And how near to you did the north caboose get at any time as you stood at No. 2 switch?

A. About 40 feet, I presume.

Q. It has passed No. 1 switch already?

A. It had.

Q. You didn't see anyone else around there but yourself, did you?

A. Myself and the man on 2446.

Q. I mean outside of your crew and the crew on the Belt drag. You didn't see anyone around there at all, did you?

A. Not when I gave that signal I didn't.

Q. Did you see any other man, Joe Brozny, throw a switch in there?

A. I never pay any attention to what is going on in other crews than my own.

Q. Did you see Joe Brozny, a car repairer, throw any switch in there that night?

A. I never notice what other fellows do.

Q. Did you see him throw a switch there that night?

A. No, sir.

Q. Where was Rock, the minute or second you first saw him.

A. Just west of the track that 2446 was coming in on.

Q. How far west?

A. I will say 15 or 20 feet.

Q. Had the caboose started up then?

A. It had just about started then.

Q. How far away from Irving Park Boulevard was the north caboose at that time?

A. I will say 125 feet.

[fol. 253] Q. And how far north of Irving Park Boulevard was the engine on the Belt transfer?

A. Just about the same distance.

Q. One hundred and twenty-five feet?

A. Yes, sir.

Q. And you saw him running?

A. I did.

Q. Fast?

A. A pretty good gait.

Q. Do you know who it was?

A. No, sir.

Q. Did you see anybody else running across there?

A. No, sir.

Q. Was that before you gave this kick signal?

A. No, sir.

Q. That was after you gave the kick signal?

The Court: Answer yes or no.

A. It was after.

Mr. Patterson:

Q. After you gave the kick signal and you saw that your kick signal had been taken——

A. Yes, sir——

Q. (continued). You saw this man run in front of the Belt engine, headed east, did you?

A. Yes, sir.

Q. And he kept on going?

A. Yes, sir, he did.

Q. You didn't give any signal to stop until he was hit, did you?

A. I gave a signal to stop the minute the man went behind the caboose.

Q. That was right when he got on the track?

A. Yes, sir.

Q. Did you holler at him?

A. He done it too quick for me to holler at him.

Q. Did you holler at him?

A. No, sir.

Q. Did you give any signal at all of any kind except to kick those cars, from the time you saw that man until he was hit?

A. No, sir.

Q. When you saw him running across in front of that [fol. 254] locomotive and coming in the path of that caboose that you saw, why didn't you give him a signal?

A. It was done so quick I couldn't give a signal.

Q. He was running fast, was he?

A. A pretty good gait.

Q. How much was the distance between the track the Belt transfer was on and the other track where he was hit?

A. I think about 14 feet, if I ain't mistaken.

Q. That is from rail to rail?

A. I think so. That is about the distance of those tracks.

Q. At the time you gave that kick signal your cabooses were still south of the locomotive engine on the belt, were they?

A. Just a litle south, yes.

Q. In other words, they had not come out in front?

A. No.

Q. A man coming from the west there, going east, with this locomotive here and a train of cars going towards him would be—that locomotive and train of cars would be between that man and these cabooses that you knew were coming out from the other side, wouldn't it?

A. No, they wouldn't be between them.

Q. If this man is west of that track he is over here. (Indicating on defendant's exhibit 1.) Here is the Belt transfer, coming on this track. (Indicating on said exhibit.) It was getting pretty close to him and back of that belt transfer engine were box cars, weren't there?

A. Yes, sir.

Q. That was a long train, wasn't it?

A. I guess it was.

Q. About how many cars would you say?

A. I don't know.

Q. And this man was moving East in front of it?

A. Yes, sir.

Q. How long was it from the time you first saw that man until he was hit?

A. Oh, probably three or four seconds.

[fol. 255] Q. Had the cabooses got into motion?

A. They had just started up, then.

Q. You think they had moved how far around?

A. Oh, probably 20 feet.

Q. How far do you think they moved from the time they started up until this man was hit?

A. I will say about 20 feet.

Q. From the time they started up, until the man was hit, about 20 feet?

A. Just about that.

Q. From the time he was hit until they stopped, how far did they move?

A. About 30, or 35 feet, something like that.

Q. What is the length of a caboose such as this?

A. I don't know. I never measured them.

Q. They are about 36 feet?

A. I don't know. I couldn't tell you.

Q. What is the purpose of having a man ride across Irving Park boulevard, on the north end of cabooses as they are shoved along?

A. For the safety of the public.

Q. Will you say that there was any one path or route followed from that depot, on the east side of the tracks, across to the oil house and the hotel there, that was more used than other places in the yard?

A. No, sir, I will not.

Q. All were used just the same?

A. Practically all were used the same.

Q. What do you mean by "practically"?

A. As I said before the space—it depends on where these men or employes are coming from, whether it is from the roundhouse, the depot or the rip track, they cut across to the nearest point.

Q. Isn't it and wasn't it at the time this accident happened, and before, a common custom and practice for

[fol. 256] switching crews to pull in on that spur track east of the depot and leave their engine and tender there while they had their lunch or supper? Wasn't that a common practice?

A. They generally went in on the Y, when they went to supper—that is south of the depot.

Q. And some of them ate in the depot, that is, those who carried their lunches?

A. Some of them, yes, sir.

Q. When they go from over in the yards to fill their lanterns, don't they use that walk across there?

A. Yes, sir.

Q. And that happens right along, doesn't it?

A. You bet.

Q. You knew that men were apt to be passing there at any time, didn't you?

A. Yes, sir, they passed there quite often.

Q. And would a man on the north end of cabooses, as they were shoved along—wouldn't it be protection to these employes to have such a man there?

A. Not if they darted out behind some crew, I don't know that it would.

Q. If they didn't it would, wouldn't it?

A. Yes, if they didn't, probably it would.

Q. When you saw this fellow run across the front of that engine, you knew those cabooses were coming up alongside of that engine, what did you do?

A. I gave a stop signal, the minute I seen a man going towards the back of these cabooses?

Q. That was the instant he was hit?

A. Yes, sir.

Q. You didn't give any stop signal until he was hit?

A. This all happened in about four seconds.

Q. Did you give a stop signal before he was hit?

A. It was impossible for me to do so.

Q. Did you?

A. No.

[fol. 257] Q. When you went over and coupled onto these cabooses, did you go inside of them?

A. I did.

Q. Where were they to be put?

A. On No. 2 track.

Q. Did you see anyone in them?

A. No, sir.

Q. Do you know a man named Hill?

A. Brakeman by the name of Hill, I think I do.

Q. Those cabooses were used by the men, at and before this time, this accident, as a place to sleep during their hours off, weren't they?

A. In summer time they generally sleep in the cabooses.

Q. And they do in winter, too?

A. Some of them—not all of them.

Q. And they eat in there and cook, do they not?

A. Sometimes they do, some of them, and some don't.

Q. Do you recall talking to Mr. Charles J. Ray, at Franklin Park, near the garage there, on the 7th day of January, 1926?

A. I never heard of Mr. Ray.

Q. Do you recall talking to a man there who told you he was there seeking information on behalf of Rock?

A. I do remember a man, yes.

Q. He told you he was from my office—my name is Patterson. Do you remember that?

A. Yes, sir. He said he was representing Mr. Patterson.

Q. Did you talk to him about how this accident happened?

A. Well, he asked me a few questions and I gave him a few answers.

Q. Didn't you say to him, at that time and place, that there was a man in that north caboose?

A. No, sir.

Q. You never said that?

A. No, sir.

Q. You are certain of that?

A. Positively.

Q. Was there any light in that north caboose, as it went north there that night?

A. When we brought it back from the depot, you mean? [fol. 258] Q. At any time.

A. There was no light in this caboose until after this accident—not until after this accident; and then this man, Hill, that you refer to, he come in——

Q. Wait a minute; I haven't asked you about that. Hill was there that night, was he?

A. He was at the depot.

Q. Did you see him over there?

A. Yes, sir.

Q. You saw him in the depot?

A. Yes, sir.

Q. Before the accident?

A. No, sir.

Q. After the accident?

A. After the accident.

Q. You don't know where he was before the accident, do you?

A. No, sir.

Q. He came running over to the depot right after the accident?

A. I don't know where he came running from.

Q. If there was a man or if there were men in those cabooses, do you make kicks of them?

A. Not when there is men in the cabooses. If we do, we ride them in.

Q. You do what?

A. If there are men in the cabooses, we ride them in or shove them in.

Q. If you ride them in a man rides the foremost end as you go along?

A. Not necessarily. Generally the man that cuts them off rides the following end going in—he rides the end——

Q. He rides the rear end going in?

A. Yes.

Q. You mean if you have men in these cabooses and you are kicking them north you will have a man on the south end and not the north end after they are cut off? Is that what you mean?

A. I said we generally shove them in or kick them in and have a man ride them in.

Q. When that man does ride them, where does he ride them?

A. He generally rides on the south end of the caboose, the following end as the caboose rolls along.

Q. The following end, that is, the rear end of the cabooses going in?

A. Yes.

[fol. 259] Q. Let us get that right. If there are two cabooses being rolled along this track going north and you know there are men in there; they are rolling north. You say the man that rides them in will be on the south end of them?

A. Yes, sir.

Q. Why?

A. To stop the cabooses in the clear.

Q. Can't they be stopped somewhere else than at the rear end?

A. Why, certainly; there is a brake on both ends of them.

Q. He rides them in just for the purpose of stopping them and not for the purpose of preventing them hitting cars in there?

A. We will not kick them in if there are cars in there.

Q. Does he have anything to do with that?

A. I have jurisdiction over it.

Q. Will you say there were no cars on No. 2 track that night?

A. Not within fifty car lengths.

Q. How far could you see in that yard that night?

A. I had been working there since 3 o'clock.

Q. How far could you see in that yard that night?

A. You can see a long distance in the yard if you are accustomed to working at night.

Q. How far could you see that night in that yard?

A. I can tell whether there are cars on that track all the way the length of that track.

Q. They do not put those cars in on that track from the south end?

A. No, sir.

Q. They work on the north end?

A. Yes, sir.

Q. And when they are making up cars and putting them in a train, the cars are worked as far south as they can get them?

A. No, sir; they shove them from the north end.

Q. Suppose a train is being made up, they would not [fol. 260] send the cars as far south as they could?

A. No, sir, absolutely.

Q. They just let the cars bump in; is that right?

A. No, sir.

Q. The first time you noticed the headlight on that locomotive on the belt transfer was when it was at Irving Park boulevard?

A. Just about at Irving Park boulevard. I will not say positively. Along about Irving Park boulevard.

Q. Did you and Rock ever have any difficulty of any kind?

A. No, sir. We were always very friendly.

Q. You did not have any discussion with him about this accident, afterward, did you?

A. Oh, we had a talk about that, yes.

Q. What hour of the night did this accident happen?

A. Seven-fifty, I think it was.

Q. Which one of the cabooses was he put in to be taken to the hospital?

A. 9949.

Q. That is the north caboose?

A. That is the caboose that run over him.

Q. You say there is no such custom or practice there of having a man ride the north end of cabooses that are shoved along the lead?

A. It depends on circumstances.

Q. What do you mean?

A. Did you say "shoved along the lead"?

Q. Yes.

A. When we are shoving down the lead we generally have a man riding on the cabooses, but when we are putting cabooses on the track, if there is room along there we leave them run.

Q. After you get to the switch that lets them in there on the switch track, you let them run?

A. If there is room in there to hold those cabooses and we want to kick them to get them in the clear, we leave them run in there easy.

[fol. 261] Q. As long as you are shoving along the main line, you say you don't have a man on the head end?

A. At all times.

Mr. Patterson: That is all.

Redirect examination.

By Mr. McInerney:

Q. On the main line?

A. On the main line.

Q. Where did you see Hill that night?

A. He come from the depot after I had notified the yard-master and the different boys around the depot that this accident had happened—Hill—he come over and made a light in the caboose.

Mr. Patterson: I move to strike out that answer.

The Court: Strike it out. Answer the question. Read the Question.

(The pending question was read.)

The Court: Strike out all of the answer.

Mr. McInerney:

Q. Where did you first see Hill that night?

A. At the depot

Q. Did you see him around the caboose?

A. Not before the accident happened.

Q. Did you see him after the accident happened?

A. Yes, sir.

Q. Did you see him in the caboose?

A. Yes, sir.

Q. What did he do?

A. He lit the lamp for us.

Q. What was his job that night?

A. I guess he was rear brakeman on that train.

Q. What train?

A. The train this caboose went out on—train 27.

Q. Is that the first time you saw him that night at the depot?

A. Yes, sir.

Mr. McInerney: That is all.

[fol. 262] Recross-examination.

By Mr. Patterson:

Q. Hill had slept in there that day, hadn't he?

A. I don't know. I didn't go to work until one o'clock.

Q. When I asked you a moment ago about having a man on the rear cabooses, when you were shoving, did I use the word "lead" or main track"?

A. I don't remember the question now.

Q. A moment ago you answered me and said that when they were shoving cabooses along the lead until they got to the switch track it was customary to have a man ride. Now, did you mean that or didn't you mean it?

A. We had a man on this caboose until he got——

The Court: No. Pay attention to the question. Read that question; then answer the question.

(The pending question was read.)

A. It is customary to have a man ride a caboose until we get to where we want to put that caboose in at.

Mr. McInerney:

Q. To get down to this case: How far would the man ride, under your custom out there, before he would get off of the end of the caboose?

A. He would ride until I would give him the signal to cut the cabooses off; then he would get to where he belonged and cut the cars off.

Q. Where was that signal given in this case?

A. The caboose was standing at about No. 1 switch.

Q. When he does ride, does he ride the head end of the rear caboose?

A. He rides the rear end of the train—of the two cabooses, until he gets the signal to cut those cars off; then he gets off, where the cut is to be made, and cuts them off and they run them on the track.

[fol. 263] Recross-examination.

By Mr. Patterson:

Q. You didn't give him any signal to cut them off, did you?

A. Yes. When I give him the signal to kick those cars in there, that means to cut them off.

Q. But you run until he cuts them off?

A. He cuts them off. No one has to run.

Redirect examination.

By Mr. McInerney:

Q. He knew where they had to be cut off?

A. Yes. We work in harmony all the time.

Recross-examination.

By Mr. Patterson:

Q. Have you anything against Mr. Rock here?

Mr. McInerney: He has asked that question. The witness said "No."

A. Absolutely no.

Mr. Patterson:

Q. Didn't you have a dispute with him and get into an argument with him because he got a lawyer in this case?

A. No argument at all.

Q. Did you have a dispute with him because he got a lawyer?

A. No, sir, no dispute.

Mr. Patterson: That is all.

Richard G. Hawley, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

[fol. 264] Direct examination.

By Mr. McInerney:

Q. Give your full name.

A. Richard G. Hawley.

Q. Where do you live?

A. Franklin Park, Illinois.

Q. What is your occupation?

A. Locomotive engineer.

Q. By whom are you employed?

A. The Soo Line.

Q. How long have you been with them?

A. Since 1888.

Q. What have you done in that time?

A. As machinist, round-house foreman, fireman—locomotive fireman; locomotive engineer.

Q. Where have you been working recently?

A. In Schiller Park, Illinois.

Q. And in the yards?

A. Yes, transfer.

Q. What is the Transfer?

A. It is known as the Belt Transfer.

Q. What is that run; from Clearing to what point?

A. It runs from Schiller Park to Clearing and return.

Q. That is a transfer of cars, is it not, from the Soo, to or from other roads?

A. Yes, sir, to or from other roads via Clearing.

Q. How long have you been on that run?

A. I think it will be three years the coming July.

Q. You were on it December 31, 1924, when Rock was injured, were you?

A. Yes, sir.

Q. How many times prior to that time did you operate engine 2446? That was your engine, was it?

A. Yes, sir.

Q. How long had you operated that engine yourself?

A. Since about March.

Q. Of that year?

A. Of that year.

Q. What kind of a headlight did it have?

A. It had a Pyle National, if I am not mistaken.

[fol. 265] Q. How did it operate with reference to dim and bright lights?

A. There was a double bulb in there; one film for a bright light and another film, on the opposite side, for a dim light.

Q. How does that operate, from the engine cab?

A. From the engine cab to the switch.

Q. Where is that switch?

A. Right over my head, behind me.

Q. You operate it with your left hand?

A. Yes, sir.

Q. When that bright light was on how far did the rays show in front of your engine? How far did the light show in front of your engine?

A. About—probably four to six hundred feet.

Q. How far is it—is there a direct ray that goes right straight down the middle of the track?

A. Yes, sir.

Q. How far from the front of your engine does that direct ray touch the ground, or how far would it be before it would touch a man's head—a man, say, 5 feet-6, 8 or 9?

A. One hundred and twenty-five or 130 feet away from the engine, probably.

Q. In that area, between the head of the engine, and that distance of 125 feet on either side of it, what kind of a light is there there?

A. I don't understand the question.

Q. Is there any difference between the ray of light that is beyond that 125 feet and the ray of light that is between the 125 feet and the head of the engine?

A. Yes, sir.

Q. What is the difference?

A. Between the direct rays, to the engine, underneath the direct rays, is a diffused light, a much milder light that covers the ground.

Q. With reference to the rails, as you were proceeding thus on the north, how far east or west of your rails does [fol. 266] this light extend, beginning at the engine, when it is high, when the bright light is on?

A. When the bright light is on it will reach out 35 or 40 feet, the diffused rays, to the——

Q. On either side of the rail?

A. On either side of the rail.

Q. If the bright lights were on and a man was, say 10 feet or 5 feet east of your east rail and 50 feet north of your engine, is there anything to interfere with his vision looking south? Does that light have any effect on his vision looking south?

A. Looking south, if he would look directly into the rays, it would blind him.

Q. You mean the headlight?

A. Yes.

Q. Assuming he looks to the next track to the east of you——

A. He would be looking east.

Q. He would be looking at the track south and east?

A. Not unless he caught the direct rays of the headlight there would not be anything to interfere with him.

Q. What is the customary time for you to pull that belt run into Kolze—any fixed time?

A. There is no fixed time. Whenever we get our work done, we start towards Kolze and continue until we arrive.

Q. Is there any hour at which you customarily get there?

A. We get there between 7 and 9.

Q. With reference to the use of the right of way by the employees of the company going east or going west, crossing the right of way, they use the right of way, don't they, to go to and from the depot, the round-house, and rip track, the beanery and the tool repair place?

A. They use that right along.

Q. They use the right of way?

A. Yes, sir.

Q. They use that, do they?

A. Yes, sir.

[fol. 267] Q. They don't go to Irving Park boulevard, to the crossing?

A. No, unless it would come handy for them to walk that way.

Q. Is there any particular spot at which they cross the tracks more than any other?

A. No, sir.

Q. Now, on this night in question you came towards Irving Park boulevard with the belt run; how many cars were you carrying?

A. I have forgotten just how many we had in that train that night.

Q. Give us your best recollection?

A. Between twenty-five and forty cars.

Q. How fast were you going as you approached Irving Park boulevard?

A. I was going probably ten miles an hour until I got to the boulevard.

Q. Then what did you do?

A. Then I slacked up and was moving alongside of the switchman that were working there, and I proceeded about four or five miles an hour.

Q. As you approached Irving Park boulevard did you see a switch engine, with two cabooses?

A. Yes, sir.

Q. Where were they?

A. They came from the caboose track over the main line and on the lead next to me.

Q. What condition was your headlight in, bright or dim?

A. My headlight was dimmed.

Q. When did you dim it?

A. At the switches, at the crossover, sixty-five car lengths south of Kolze.

Q. What did you do when you dimmed it?

A. The head man goes into the telephone booth and gets the running track to leave his train in the yard. As soon as I arrived there I reached up and put my headlight out; left it out until I got orders from him where to go to.

Q. Did you observe the track in front of you, from that [fol. 268] point until the time of the accident?

A. Yes, sir.

Q. What light was shown in front of you?

A. The headlight of the switch engine I could see part of the time.

Q. With reference to your own engine what light did you have on?

A. I had my dimmed headlight on.

Q. Does that show in front of your engine?

A. Yes, sir.

Q. How far does that show?

A. Two hundred and fifty or three hundred feet.

Q. Does that blind anybody?

A. No, sir, not unless you look into the direct rays of it.

Q. Right in the yard track?

A. Yes, sir.

Q. What kind of a night was that?

A. It was partly cloudy; the visibility was very good and there was a southwest wind blowing lightly.

Q. There was snow on the ground?

A. A trifle.

Q. Do you know Joe Rock?

A. Yes, sr.

Q. Did you see him on this night?

A. Yes, sir.

Q. Where was he when you first saw him?

A. When I first saw him he came in sight in front of the engine, on the left hand side of the engine, and crossed over the track in front of me.

Q. How far west of your west rail was he when you first saw him?

A. I couldn't see him very far west of the west rail, because he was so close to the engine that he wouldn't show until he got almost in front of the engine.

Q. How far was he north of your engine when you first saw him?

A. I would judge about twenty feet.

Q. What was he doing?

A. He was running.

[fol. 269] Which way?

A. Towards the east.

Q. Did you watch him from the time you first saw him until he passed out of your vision?

A. Yes, sir.

Q. What, if anything, did he do while he was running? Did he change his pace?

A. He didn't change his pace.

Q. Did you see what he was doing?

A. I saw him swinging his lantern around as though he was locating the engine, but no hesitation.

Q. At the time he ran in front of you how close was he in front of your engine?

A. About 40 feet. He maintained that distance by running diagonally.

Q. What did you do?

A. I proceeded on my way until I noticed Mr. Hudson, the conductor, on the switch engine giving a violet signal to stop.

Q. Then what did you do?

A. After I heard them hollering that they "hurt somebody" I applied my brake and stopped.

Q. Now, at that time this man ran across in front of you, did you see the cabooses at that time or did you know where they were?

A. I knew they were approaching from the rear. I couldn't see them at the time, though.

Q. You don't know where they were with reference to your engine?

A. No, sir.

Q. Do you know the custom in the Kolze yard, in making a movement such as was made with these cabooses here,

say north of Irving Park boulevard, intending to kick them into Track Number 2, whether it is customary to have a [fol. 270] man ride them?

A. Not unless they want to make a specific car, and when there is room they kick them the same as they would a box-car.

Q. Without a man riding them?

A. Yes, without a man riding them.

Q. Without lantern protection?

A. No lantern protection.

Mr. McInerney: That is all.

Cross-examination.

By Mr. Patterson:

Q. Mr. Hawley, about what is the length of the average box-car?

A. From 40 to 60 feet.

Q. There are more of them around 40 than 60, aren't there?

A. Forty to 45 is the general run.

Q. At the time you first saw Rock he was about 20 feet ahead of your engine?

A. About 20 feet ahead of the engine, yes, sir.

Q. About as far as from where I am to you, would you say? (Indicating.)

A. About that far ahead of the engine.

Q. You saw him coming on the west side, is that right?

A. Yes, sir.

Q. And you were on the east side?

A. On the east side.

Q. From your position in your cab, on the east side of that locomotive, as it faced north, how could you see a man on the west side of the track?

A. My vision crosses in front of the engine, I would judge about 18 or 20 feet in front of the engine, and I can see the west rail.

Q. That is all you can see at that distance?

A. Yes, sir, about that distance.

[fol. 271] Q. You have got to be looking with that in mind or you can't see that at all; is that right?

A. You have got to be looking for it.

Q. You think he was there, west of that track, do you, when you first saw him?

A. I think he was.

Q. About how far?

A. About 20 feet.

Q. West of that track?

A. Oh, no, no; he was just about stepping on the track. He must have been on the track when I first saw him.

Q. Which was it—was he on the track?

A. He would be on the track when I first saw him.

Q. He was already on it?

A. He was already on it.

Q. And you were moving about how fast?

A. Around four of fives miles an hour.

Q. And after the man had been struck, you brought your locomotive to a stop about even with the place where he lay, did you?

A. Almost even with where he lay.

Q. How far do you think he moved from the time you first saw him until you brought your engine to a stop?

A. Probably a car and a half.

Q. Isn't it a fact that he passed ahead of your engine two car lengths?

A. No, sir.

Q. Do you remember talking to Mr. Ray, a man who investigated this case for Mr. Rock and me, his lawyer—Charles J. Ray?

A. I spoke to somebody. I am sure I couldn't tell you now who it was. That is the gentleman that came to the house to see me.

Q. He came to your house on the 19th of January, 1926—a man who wore glasses?

A. Yes; I spoke to the man.

Q. He introduced himself as being from Mr. Patterson's office, didn't he, and did you tell him, then and there, that Rock passed in front of your engine a distance of two car lengths?

A. Not to my knowledge.

[fol 272] Q. Well, do you remember anything about that?

A. I remember a man being there and I remember con-

versing with him, but I don't think I would make any such a statement as that, because I knew different.

Q. Your best recollection, then, is that you did not make that statement?

A. I don't think I did.

Q. Now, a car length and a half—from the time you first saw Rock until you stopped, in feet about how far is that?

A. It will run 60 to 70 feet.

Q. The cabooses had not passed you at the time you first saw Rock, had they?

A. No, they had not.

Q. Did you see anybody on those cabooses at all?

A. I did.

Q. The north end?

A. Yes, sir.

Q. You think there was a man riding them, too?

A. I know there was.

Q. The north end of the caboose?

A. Yes, sir.

Q. On the rear platform?

A. On the rear platform.

Q. With a lantern?

A. Yes.

Q. Who was it?

A. I discovered afterwards—

Q. No; what you knew then?

A. I don't know who it was; I knew it was a switchman.

Q. Do you know Cutler?

A. Yes, sir.

Q. Do you know Fitzgerald?

A. Yes, sir.

Q. Was it either one of them?

A. Cutler.

Q. Where was he riding?

A. He was riding on the leading platform when I saw him.

Q. The foremost platform?

A. Yes, sir.

Q. That is when you were down at Irving Park boulevard, was it?

A. At the Irving Park boulevard, yes, sir.

Q. At the time you saw Rock cross in front of you, was there any man riding that northernmost caboose?

[fol. 273] A. My attention was attracted to Rock at that time. I wasn't watching cabooses at that time.

Q. So you don't know how far that man stood on that north platform?

A. No, sir, I don't know how long he stood on there.

Q. You knew, did you not, that the yard office is in the depot?

A. Yes, sir.

Q. And the other railroad offices, if any, are east of the track near that depot?

A. Yes, sir.

Q. Are there any other offices besides the yardmaster's office?

A. The yardmaster's office and the agent's office.

Q. Is there a telegraph operator over there?

A. A telegraph operator.

Q. And that is the place where all switchmen report for work and so on, isn't it?

A. Yes; they go over that way when they report for work.

Q. And that is where the board is, where they are chalked up for runs, isn't it?

A. Yes, sir, in the yardmaster's office.

Q. And they report there?

A. Yes, sir.

Q. And as you go directly west from that depot—you go directly west and you come right over to the freight house, on the west side of the tracks, and the car repairers' shanty, the oil house and the eating house? Is that right?

A. Yes, sir.

Mr. McInerney: No freight house.

Mr. Patterson: Yes. Isn't that a freight house?

A. Yes, there was a box car there at that time.

Q. And the direct path, from the yardmaster's office and these other agent's offices from the yardmaster's office to the depot, is right across between number one and number two switch; isn't it?

A. Yes, sir.

Q. A direct path?

A. Yes, that is the most direct way to go. That is the most direct way to go, but there is no path there.

[fol. 274] Q. What do you mean by that? Do you mean there is no laid out path?

A. No well-defined path.

Q. No well-defined path?

A. No well-defined foot-path.

Q. You have been there a good many times?

A. Yes, sir.

Q. But that is the direct route these men take in going back and forth between these places?

A. Yes, sir.

Q. And, knowing that, you, as an engineer—did you keep a lookout for them there?

A. Everywhere I go.

Q. And especially when you know it is a place where railroad employees cross and re-cross, do you not?

A. Yes, everywhere I go.

Q. And it is because of keeping a lookout that you have someone ride a car or cabooses across Irving Park boulevard?

A. Yes, sir, to protect traffic on the highway.

Q. Were you still moving when the cabosses passed you?

A. No, sir.

Q. You had stopped?

A. They hadn't passed me.

Q. Did the cabooses ever pass you that night?

A. Yes, they did, when they first made a movement coming out of the caboose track.

Q. No, I am talking about places north of Irving?

A. No, they never passed me there.

Q. They never got ahead of you?

A. They were ahead of me as I went across the crossing exactly.

Q. They were standing over there?

A. Yes, sir.

Q. You kept on going?

A. I kept on moving.

Q. And didn't stop until after this accident happened?

A. No, sir.

Q. Did these cabooses ever get *passed* your engine?

[fol. 275] A. Not up to the time they stopped after Rock was hurt.

Q. They did pass your engine, didn't they?

A. No, sir.

Q. I don't mean to dispute you. From the time you first saw Rock you kept on moving until the thing was all over, didn't you?

A. Yes.

Q. Did these cabooses, after you passed them down there where they were standing, again that night get ahead of your engine?

A. Not the entire caboose, no.

Q. How much of the caboose?

A. Well, I would judge they were almost even with the front end of the engine, because the gangway of my engine was just opposite the coupling of the two cabooses.

Q. Did you see Rock get hurt?

A. No, sir.

Q. It was on your side, wasn't it?

A. He was around the end of the caboose when he got hit, out of my vision.

Q. He was in front of the caboose?

A. Yes, sir, he was in front of the caboose.

Q. The caboose was between you and Rock?

A. Yes, sir.

Mr. Patterson: That is all.

Redirect examination.

By Mr. McInerney:

Q. Who was on your crew that night?

A. Mr. O'Conner, Mr. Fitzgerald and Mr. Cutler.

Q. Do you know who threw the switch for you that night as you approached the point of the accident?

A. No, sir, I do not.

Q. Do you know whether O'Connor threw it?

A. I don't know, I am sure.

[fol. 276] Q. Was O'Connor riding the front end that night?

A. He was riding the front end that night. That switch is located on the left hand side of the engine and as I approach it, it goes out of my vision.

Recross-examination.

By Mr. Patterson:

Q. Is all of the light that is on the head end of your engine up in the one bulb—one globe?

A. Yes, sir.

Q. How high up on your engine is it?

A. I would say it is about ten feet.

Q. It is not on the boiler head?

A. No, sir, it is swung on the front end there.

Q. Is it as high as the highest part of the body of your locomotive?

A. No, sir.

Q. And how far is it from the top of the boiler head down to where this light was placed?

A. It might be 3½ feet.

Mr. Patterson: That is all.

Redirect examination.

By Mr. McInerney:

Q. Mr. Hawley, can you fix a point on this map where he crossed in front of you, on this map, defendant's exhibit 1?

A. Right there. (Indicating on said exhibit.)

Q. Indicating a point between No. 1 and No. 2 switch—the frog of No. 1?

A. Yes, sir.

Q. Where the lines cross on the map, about midway between them?

A. Yes, where the lines cross, about midway between them.

Mr. McInerney: That is all.

[fol. 277] Jerry O'Connor, called as a witness in behalf of defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McInerney:

Q. What is your full name?

A. Jerry O'Connor.

Q. Where do you live?

A. Franklin Park, Illinois.

Q. What is your business?

A. Switchman for the Soo Line.

Q. How long have you been a switchman?

A. Between 12 and 13 years.

Q. With the Soo Line——

A. Six years for the Soo Line last September.

Q. The last six years with the Soo Line?

A. Yes, sir.

Q. And the other seven with whom?

A. I worked for the Northwestern, the Great Western, the Great Northern, the B. & O. C. T. and the Soo Line before.

Q. As switchman?

A. As switchman and brakeman.

Q. Has that been your railroad career?

A. Well, I worked for logging roads, contractors that handle cars, moving dirt, moving logs.

Q. Have you worked in the Kolze yard of the Soo Line, at Schiller Park, the last seven years?

A. In and out of that yard.

Q. What do you mean by that?

A. When I worked in the yard exclusively I went to work on switch engines, and when I worked out of the yard I worked on transfer runs. I have worked on every job they have.

Q. Have you ever worked on the run where they take cabooses back east of the depot and up to Irving Park boulevard?

A. Yes, sir.

Q. To make up trains 21 and 27?

A. Yes, sir.

[fol. 278] Q. How often have you done that?

A. That would be hard to estimate. I worked on what is known as "south end" jobs for months at a time several different times.

Q. Roughly, how many different times were you on that particular operation to your best recollection?

A. Well, I can safely say I have done it hundreds of times.

Q. On this particular night you were running with Hawley, were you not, on the Soo Line?

A. Yes, sir.

Q. That is the transfer run from Clearing to the yards of the Soo Line?

A. Yes, sir.

Q. Going out and getting cars destined to the Soo by way of Clearing?

A. Yes, sir.

Q. What were you doing on the belt run that night?

A. I was working the head end.

Q. What does that mean?

A. The duties of the head man are to stay on the head end and throw the necessary switches to let the train into and out of the yards and to assist in getting the train together at the yard, where we obtain our train. Those are the principal duties of the head man.

Q. Well, you performed your part—performed those duties that night, didn't you?

A. Yes, sir.

Q. Now, as you approached Irving Park boulevard, what track were you running on?

A. We were running on what is known as the new lead at that time.

Q. And that is shown on this map, defendant's exhibit 1, is it, called "New Yard Lead Track," being the westernmost track, except the ice track—is that right?

A. That is right.

Q. Did you see this engine pushing the two cabooses at [fol. 279] any time as you approached Irving Park boulevard?

A. I observed the movements of the engine for some time, while entering the yard, while crossing over from the main lines toward the lead you mentioned, I glanced over that way a number of times; saw that engine making movements over there, and I surmised that they were getting cabooses. I knew that was the usual time they got cabooses there.

Q. Did you see these cabooses at any time being pushed northward over Irving Park boulevard?

A. No.

Q. Did you see them stop there?

A. At Irving Park boulevard?

Q. Yes.

A. I don't recall that I did.

Q. You were all the time on the front of the engine, were you not?

A. I was on the front of the engine.

Q. How, what was the condition of the headlight on your engine?

A. It was dimmed.

Q. When was it dimmed?

A. It was dimmed when we stopped on the outskirts of the yard; that is about a half a mile south of Irving Park boulevard. It is our regular stopping place when bringing trains into Schiller Park yard from Chicago. We stop there for the purpose of calling up the yard office to find out which track they want it to head-in on, and after obtaining that information we cross over on to the other main line, and from that main line to what is known as the "working lead," and the again, we cross over from the working lead to that new lead.

Q. Assuming that is the track you are told to go in on——

A. That lead is a lead to a number of tracks that run from 12 to 27, and our head-in may be almost any one of those tracks.

Q. Did you use the same lead all the time?

A. We do when we are going into that yard, but there are other times when we head into tracks that are off of [fol. 280] the other lead—the working lead.

Q. This particular night you got this lead?

A. On that particular night we got a head-in that called for the use of the new lead.

Q. You stood on the front of this engine from that time until the time that Rock was injured, did you?

A. I beg pardon.

Q. Did you stay on the front end of that engine from the time you got your orders until the time Rock was injured?

Mr. Patterson: I object to that.

The Court: Objection sustained.

Mr. McInerney:

Q. Where did you stay from the time you stopped until the injury? What did you do?

A. After obtaining the head-in I walked ahead of the engine and lined the first pair of cross-over switches. I then got on the left-hand foot-board of our engine; staid on it until we came to the next switch, a distance of approximately 800 or 900 feet; got off and ran ahead of the engine and threw that switch; got on the foot-board, in the same space again, on the left-hand side. My switches were all on theleft-hand side, all switches that I have to throw to complete head-in, and after throwing the third switch I got on in the same position; got off to throw the fourth switch, which would be the one from the old lead over to the new lead——

Mr. McInerney: Show me that on this map, please.

A. Yes, sir. I can't show you the switches that I have mentioned so far, because the map does not show them.

Q. Is the one that you have just mentioned on there?

A. No, sir. They would be back here. (Indicating.)

Q. Proceed now. What happened after you threw that switch? Where were you then?

[fol. 281] A. After I threw the fourth switch I got back on the foot-board, on the left-hand side, in the same place. The next switch was lined for me; it was all right. I did not again get off of the foot-board until after the accident had taken place.

Q. For how long a distance did you travel on the left-hand side of the foot-board without getting off after you did your last job? How long a distance was that?

A. Well, I would have to estimate roughly.

Q. An estimate is all I want.

A. Oh, perhaps six or seven hundred feet.

Q. And during this time and all the time from the time you got your head-in order did you observe the headlight?

A. I knew positively that the headlight was out. Had it been bright I could not have failed to notice it, because it would have been a very unusual thing.

Mr. Patterson: I ask to strike that out.

The Court: Strike it out.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. McInerney:

Q. Did you observe the headlight during that period, 900 feet, from the time you got your head-in order; did you pay any attention to the headlight? Did you know what kind of a light was working on that engine?

A. I did not look directly at the headlight.

Q. What did you observe with reference to the lights?

A. I was aware that the dimmer was working instead of the bright light because, if the bright light was on, I could not have failed to notice it, it is so much stronger.

Q. When you approached Irving Park boulevard, say at [fol. 282] the north line, how fast were you going?

A. Why, about four or five miles an hour.

Q. Did you then see these cabooses or not?

A. As we were approaching the boulevard from time to time I was getting on and off of the engine, throwing these various switches, and I noticed from time to time that that engine was making moves on the other side of the yard, in the neighborhood of the caboose tracks——

Q. Did you ever see it on the track next to you?

A. I did not see them on the track next to us until just at the time that this accident occurred, because the cabooses were directly opposite me.

Mr. Patterson: I object to that.

Mr. McInerney:

Q. At the time the accident occurred you did see them, did you?

A. Yes, I did.

Q. Where was the rear end of that rear caboose at the time of the accident? I mean the end going north. The north end of the cabooses being shoved north, you say, were opposite the front end of your engine at the time of the accident?

A. Yes, sir.

Q. Did you see Rock that night?

A. I did.

Q. Where was he when you first saw him?

A. He was approaching from the direction of the company hotel; that is, approaching from my left.

Q. How far west was he of your west rail when you first saw him?

A. I would say in the neighborhood of 15 or 20 feet.

Q. And how far north of the head of your engine was he?

A. He crossed ahead of our engine about 15 or 18 feet.

Q. What was he doing?

A. He was running?

Q. In which way was he facing?

A. Facing east.

Q. Where did he get out of your sight?

[fol. 283] A. I watched him until he got struck down.

Q. Did you see him struck?

A. Yes.

Q. Did he make any change in his pace or do anything else but run from the time you saw him until he was struck?

A. He did not.

Q. Do you know what the practice is in shoving cabooses north of Irving Park boulevard with the intention of kicking them in on Track 2, off of old lead No. 2?

A. Very well.

Q. With reference to whether or not the rear end is protected?

A. Yes.

Q. What is the custom?

A. The custom, in handling cabooses, is exactly the same as it is in handling any other cars——

Mr. Patterson: I ask to strike that out.

The Court: Strike it out.

Mr. McInerney:

Q. Tell what it is in handling cabooses; never mind any other car.

A. It would depend on what one would want to do with the cabooses.

Q. In this case they were to be kicked into Track No. 2, which had a leeway of 50 car lengths. What is the custom at Kolze?

A. The custom is to kick the cars in there. Usually the man cutting off the cars drags them in and stops them in the rear until such time as they wish to couple them on the end of the train. Usually, if the weather is cold, the cars will not run so well, and the foreman, in his judgment, thinks it is not necessary to stop the cars with a hand brake and kicks them in there.

Q. What is the practice, whether or not a man rides the rear end, with a lantern—I mean the front end, going to the north, in a kick-in o-eration, with a leeway of 50 car lengths?

A. It is not customary to ride them in when the room [fol. 284] is known to exist.

Q. Did you throw the switch shown here? (Indicating on defendant's exhibit 1.) Look at this, please. What was the last switch you threw shown on this map?

A. I threw no switches shown on that map.

Q. Was this switch thrown—pointing to a switch on your new lead track, on No. 1 or No. 2?

A. That switch was wrong for our movement, and I remained on the footboard, and as we approached it, a car man was crossing, in the direction of the depot, or crossing from the depot in the direction of the car men's shanty—I presume that is where he was going. This is the car men's shanty (indicating on defendant's exhibit 1) where I presume that is where he was going, and he threw it for me.

Q. What was his name?

A. I don't know his name.

Q. Now, referring to the use of the right of way there, Mr. O'Connor, by the employees of the railroad; they cross the right of way there, don't they, right along, using it as a means of getting to and from different places?

A. Yes, they do.

Q. Is there any particular spot in that vicinity they use to the exclusion of any other?

A. No, sir.

Mr. McInerney: That is all.

Cross-examination.

By Mr. Patterson:

Q. How far south of Irving Park boulevard is it on that track that you were traveling over before you come to any switch that you threw?

A. I did not throw any switch on that lead.

Q. The last one you threw was away south, that lets you over from the old yard lead on to the new yard lead, wasn't [fol. 285] it? Away down in here somewhere? (Indicating on defendant's exhibit 1.)

A. Do you want me to explain it to you?

Q. Just answer the question—down south, and it let you from the old yard lead on to the new yard lead, didn't it?

A. Yes, sir.

Q. How far south of Irving Park boulevard?

A. How far south of Irving Park boulevard? About five or six hundred feet; possibly 700.

Q. You say that you got up here, coming along to that new yard lead, that switch there was against you?

A. Yes, sir, it was.

Q. A red light?

A. Yes, sir.

Q. Does that mean that this light here, at Irving Park boulevard, would be red, also? (Indicating on defendant's exhibit 1.)

A. No, sir.

Q. You mean that you would have this light—this might be closed so you could move it over to that track, and yet the other end of it be open? (Indicating on said exhibit.)

A. Yes, sir.

Q. Is that a usual thing?

A. Oh, yes, very usual. It is an ordinary switch.

Q. Well, how close to Joe Brozny were you when you asked him to throw that switch?

A. How close to who?

Q. Joe Bronzy, that car man, as you call him?

A. I didn't ask him to throw that switch.

Q. You didn't ask Joe Brozny to throw it?

A. No, sir.

Q. How did he know you wanted him to throw it?

A. He could see that I was on that lead; that I was approaching in that direction; that that switch was wrong for our movement.

Q. How could he know which way you were moving?

[fol. 286] A. Because he was a short distance from our engine; he threw the switch as a matter of courtesy.

Q. You were accustomed, in moving cars on that lead, to have some car repairer throw switches?

A. I didn't have him throw the switch.

Q. He did it out of the goodness of his heart?

A. He threw it on his own responsibility.

Q. What did you do?

A. I didn't do anything. I had another switch to throw farther down in the yard.

Q. How close to that switch were you when he threw it for you?

A. Well, we had passed the boulevard; I should say I was about 30 or 40 feet. I was preparing to get on the ground and go to the switch.

Q. You were moving right along?

A. Yes, sir.

Q. Getting ready to hop off and throw that switch?

A. Yes, sir.

Q. And then Rock ran through between you and Brozny?

A. No, sir, I didn't say that he run in between us at all.

Q. If Joe was 30 feet ahead of you when he threw that switch and Rock went across 15 or 18 feet ahead of you, he ran in there between you and the fellow throwing the switch, didn't he—did he not?

A. No.

Q. Where was the car repairer that threw the switch when you first saw him?

A. Quite close to the switch.

Q. Well, how close?

A. Oh, he might have been 10 or 15 feet.

Q. Standing there?

A. No, sir; he was walking across the main line. I believe he was about where the working lead is, or maybe a little closer to the switch.

[fol. 286½] Q. He was traveling from east to west, was he?

A. Yes, sir.

Q. And when you first saw him he was over in here somewhere from the crossing, from the east going west.

A. He was a little farther north than that.

Q. Well, here is the switch that he was supposed to throw. (Indicating on defendant's exhibit 1.)

A. Yes, sir.

Q. You think he was north of that?

A. No, he was about due directly east of the switch.

Q. And about 15 feet over there? (Indicating on said exhibit.)

A. Somewhere in the vicinity of that old lead track there.

Q. And at that time you were 30 feet away, about, you will say, as near as you can tell?

A. Yes, sir.

Q. Did you know, when you saw him 15 feet away, that he was going to hurry over there and throw that switch for you?

A. I said that when I first——

Q. No, just answer me; when you saw him 15 feet away from that switch, and east of it, did you know he was going to throw that switch for you?

A. I didn't know he was going to do it, no.

Q. And you wait until you get 30 feet from a switch before you get off of a moving train to throw it?

A. Yes, sir, we do. Closer than that some times—12 or 15 feet.

Q. Are those switches kept locked?

A. No, sir.

Q. If any switches are lined up after a movement and locked, that is wrong, is it? They are not kept locked?

A. Beg pardon; I didn't understand that.

Q. If any one says that after a movement is made over [fol. 287] those switches and they are lined back and locked, that is not correct, is it?

A. Your question is not clear to me.

Q. Are any of those switches locked?

A. No, sir.

Q. None of them around there at all?

A. No, sir.

Q. It is an iron ball, at the end of an iron rod, that you throw?

A. No, sir, it was not that type of switch.

Q. What type was it?

A. It is known as a dwarf stand.

Q. How does it operate, without going into details?

A. It operates by merely picking the handle up out of the notch it sets in——

Q. And moving it around?

A. Yes, sir.

Q. When you first saw Rock you thought he was about how far from the track you were on?

Q. When I first saw him, oh, 15 or 20 feet, in that neighborhood, possibly, to my left.

Q. Running fast?

A. He was running.

Q. You knew it was Rock then, did you?

A. No, sir.

Q. He kept running, did he?

A. Yes, sir.

Q. No slow-down at all?

A. No, sir.

Q. Did he increase his speed any?

A. I can't say positively that he did increase his speed.

Q. Was that about the time you were watching this car repairer throw that switch?

A. Oh, no; the car repairer had thrown the switch and had passed on to wherever he was going.

Q. So that Rock, 15 or 20 feet to the west of you—you were how far from that switch then? You said awhile ago——

A. I was quite a bit closer then.

Q. About 20 feet at that time, were you?

A. Possibly, or possibly closer.

Q. And between the track that your train was running on and the next track east of it is a distance of about 15 [fol. 288] feet, isn't it?

A. The distance between the old lead and the new lead you are referring to?

Q. Yes.

A. Approximately 15 or 18 feet.

Q. And all of this time your train was running at about what speed, as near as you can judge?

A. About four or five miles an hour.

Q. How fast do you think Rock was running?

A. I don't know.

Q. Now, Mr. O'Connor, did you ever switch those cabooses in on those different tracks when trains were being made up?

A. Many times.

Q. Did you ever keep any lookout on them when you were passing along, just north of Irving Park boulevard, where men cross and re-cross all the time?

A. Yes, sir.

Q. Where these men crossed from the depot and the yard office over to the car repairers' shanty, the oil house and the eating house, shoving cabooses along there, it was customary, to keep some lookout ahead?

A. We do, but we don't confine our attention to watching out for other people. We have ourselves and members of our own crew that we watch out for in preference.

Q. Sure—to keep a lookout for railroad employees; that was customary?

A. For any one that might be crossing.

Q. And if you were shoving cabooses along there, how did you do that, by having a man on the head caboose, the foremost caboose?

A. No, sir.

Q. How would you keep that lookout if you didn't have someone on the foremost caboose?

A. Just how do we keep that lookout?

Q. Yes.

A. It would depend on just how I was going to make the move, how I would endeavor to protect anyone else.

Q. You have stated that, in shoving cabooses along that [fol. 289] track that we are talking about, where these men cross and re-cross—these employees—that you would keep a lookout there; if you did not do that by having a man ride the caboose, how did you do it?

A. But we maintain a lookout——

Q. No; please answer the question.

(The pending question was read.)

A. How did I do it or how would I do it?

Q. How did you do it?

A. If I was making that very same move that was made that night?

Q. No, I am not asking you about that. Just answer the question.

A. In no particular way.

Mr. Patterson: That is all.

Redirect examination.

By Mr. McInerney:

Q. When you said no switches out there were locked what did you mean?

A. I meant that none of the yard switches are locked; only mainline switches are locked and crossover connections with the main line.

Q. The crossover connections with the main line have locked switches?

A. Yes, sir.

Q. And when you line one of those up you have to remain there and lock it?

A. Yes.

Q. Against the next move?

A. Yes.

Recross-examination.

By Mr. Patterson:

Q. How far ahead of your engine could you see that night when you rode along there north of Irving Park boulevard?

A. I could see objects, possibly, anywhere from 100 to 150 feet ahead of our engine with a dimmer on.

Mr. Patterson: That is all.

Mr. McInerney: That is all. That is the defendant's case.

[fol. 290] Mr. Patterson: We have a little more in rebuttal.

(Short recess.)

Whereupon the defendant rested its case.

And thereupon the plaintiff, to further maintain the issue in his behalf, introduced the following evidence in rebuttal:

CHARLES J. RAY, called as a witness in behalf of the plaintiff in rebuttal, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Patterson:

Q. What is your name?
A. Charles J. Ray.
Q. Where do you live?
A. 4850 Quincy Street.
Q. Chicago?
A. Yes, sir.
Q. What is your business?
A. Investigator.
Q. For how long have you been an investigator?
A. Twenty-five years.
Q. Here, in the city of Chicago?
A. Yes, sir.
Q. And have you been employed or connected with any one law firm or lawyer, or have you done work for several?
A. Well, I was with James C. McShane for twenty years, and the last couple of years I have been working for several lawyers.
Q. Where is your office?
A. In the Conway building.
Q. Did you interview, at my request, one George Ourado and Mr. Jack Fitzgerald and Mr. Richard Hawley, in connection with an accident to John Rock on December 31, 1924?
A. Yes, sir.
Q. Now, I will ask you if you recall talking, on January 8, 1926, with one George Ourado, an engineer of the Soo Line, in regard to this accident to Rock?
[fol. 291] A. Yes, sir.
Q. Did he, at that time and place, say to you that—"I do not know what was the condition of the headlight on the belt train engine, whether dim or bright, as I did not notice or see it"?
A. Yes, sir.
Q. Do you recall talking with one Jack Fitzgerald, on the 12th of January, 1926, at the hotel, at Kolze, in the lunch room, in regard to the same accident?

A. Yes, sir.

Q. Did he, at that time and place, say to you that this—or, in substance, words to this effect: "It is the custom to dim electric headlights in pulling into the yard, but whether or not this belt drag engine had its headlight dim I could not say, as I did not notice?"

A. Yes, sir.

Q. Do you recall talking to an engineer named Richard Hawley, on the 9th of January, 1926, at Franklin Park, in regard to the same accident?

A. Yes, sir.

Q. Do you recollect whether or not he said to you that—"I saw Rock"—referring to John Rock—"the plaintiff in this case, run across in front of my engine, at a distance of about two car lengths"?

A. Yes, sir.

Cross-examination.

By Mr. McInerney:

Q. You were twenty years with James C. McShane, were you?

A. Yes, sir.

Q. In his regular employ?

A. Yes.

Q. Your business there consisted in investigating personal injury cases, didn't it?

[fol. 292] A. Yes, sir.

Q. Just as in this case?

A. Yes, sir.

Q. Mr. McShane was representing the people who were suing corporations and railroads for damages due to personal injuries?

A. Chiefly.

Q. That was 99 per cent of his business, wasn't it?

A. It was a big part of the business.

Q. And you were engaged in that particular branch?

A. Yes, sir.

Q. And a part of your duties was to go out and get statements from witnesses?

A. Yes, sir.

Q. And find out what they were going to testify to on the trial of cases; is that so?

A. Yes, sir.

Q. And since you left McShane you have been doing the same sort of business for other lawyers, have you?

A. Yes, sir.

Q. Does that constitute all the services you perform for lawyers?

A. You mean investigating?

Q. Of any kind?

A. Yes.

Q. You do nothing else but investigate accidents after they happen?

A. Yes.

Q. At whose request did you interview Ourado, Fitzgerald and Hawley?

A. Mr. Patterson.

Q. Did he tell you then that they were witnesses to an accident to Rock, here?

A. I don't know that he told me, but I learned, in some way, that they were connected with it.

Q. You knew that they were connected with it?

A. Yes, sir.

Q. And at the time you went out to see them had you made any investigation of this accident?

A. I saw several people in the case.

Q. You had seen several people in the case?

A. Yes, sir.

[fol. 293] Q. You mean witnesses?

A. Yes, sir.

Q. Did you have written statements from them?

A. Yes, sir.

Q. Signed by them?

A. Some of them.

Q. And so you knew what other people had said about that accident, didn't you?

A. If I had seen them before I saw these men. I don't remember whether I did or not.

Q. You don't remember whether you saw them before or after?

A. No, sir.

Q. The first man of these three you went to see was Hawley?

A. I don't remember. I know Fitzgerald was the last.

Q. You said you saw Hawley January 9, 1926. How do you remember that day?

A. I don't remember that date, only from my memorandum.

Q. So when you testify to that you don't know whether it was that date or not?

A. Yes.

Q. When you saw Hawley?

A. Yes, I recollect that it was.

Q. What makes you remember it?

A. I refreshed my recollection.

Q. You did?

A. Yes, sir.

Q. So you were testifying from a memorandum, were you?

A. No, I was testifying from my recollection.

Q. But you had refreshed it from what?

A. From my statement—from the statement.

Q. What statement?

A. From that man.

Q. Did he give you a statement?

A. Yes, sir, it was written out.

Q. Did he sign a statement?

A. I don't remember whether he did or not.

Q. Did you ask him to sign a statement?

A. I don't know whether I did or not. I presume I did. [fol. 294] Q. Did he sign it?

A. I don't know that.

Q. But you do remember his exact language, do you?

A. Yes, sir.

Q. How long did you talk to Hawley?

Q. It might have been a half an hour or three-quarters.

Q. Were you told to get signed statements from these witnesses?

A. I always do.

Q. Were you told to get signed statements from these witnesses?

A. Not particularly.

Q. Were you, particularly or not?

A. I was told to get their statements.

Q. Were you told to have their statements signed by them?

A. That is a standing instruction.

Q. No—pardon me. Answer the question.

(The pending question was read.)

A. That is a standing instruction.

Q. Please answer the question.

(The pending question was read again.)

A. Not specifically that one.

Q. Please answer the question yes or no.

The Court: That answers the question—"not specifically."

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Mr. McInerney:

Q. Were you told to have any one of the three sign their statements?

A. Not specifically those three.

Q. Was there any other way you remember being told anything except specifically?

A. Specifically means particularly, doesn't it?

Q. I don't know what you think it means. You must know.

[fol. 295] A. Neither do I.

Q. Where did you see Fitzgerald?

A. In the Y. M. C. A. lunch room.

Q. When did you write this statement that you wrote out in your handwriting, purporting to be what Hawley said? Did you write that out?

A. I don't remember whether I did or not at that time.

Q. Did you make any notes at the time?

A. I don't recall that.

Q. Did you make any notes at the time you saw Ourado, January 8, 1926?

A. I don't remember that.

Q. Did you write anything at all at that time?

A. I don't know whether I did or not.

Q. Is that true of the time you saw Fitzgerald?

A. The same thing.

Q. So you don't know whether you made any memorandum of anything that was said at that time by any one of these gentlemen, at the time they made it, nor did you make any memorandum of the date on which you say you saw them, did you?

A. I don't know whether I did or not.

Q. So you are telling us now what you remember their having said, one on January 9, one on January 12, and one on January 8, 1926? Is that true?

A. Yes, sir.

Redirect examination.

By Mr. Patterson:

Q. Did you later have the gentlemen write out the statements there—did you later write out what they told you?

A. Yes, sir.

Q. And did you put down the date on which it was obtained?

A. Yes, sir.

Mr. McInerney:

Q. When you wrote them out you used the best of your recollection as to what they said prior to the time you wrote [fol. 296] them out? Is that right?

A. Yes, sir.

Mr. McInerney: That is all.

Mr. Patterson: That is all.

JOHN ROCK, the plaintiff, recalled as a witness in his own behalf, in rebuttal, further testified as follows:

Direct examination.

By Mr. Patterson:

Q. You are John Rock, the plaintiff in this case, are you?

A. Yes, sir.

Q. Do you know a brakeman named Hill that worked for the Soo Line at the time you were hurt?

A. Yes, sir.

Q. Did you see him the night of your accident?

A. Yes, sir.

Q. How long after you were hurt did you see him?

A. About a minute or two.

Q. Where did he come from when you saw him?

A. From the caboose.

Q. The caboose that ran over you?

A. Yes, sir.

Q. Where were you then?

A. I was laying—well, right—practically between the two cabooses, only on the outside of the track.

Mr. Patterson: That is all.

Mr. McInerney: That is all. No cross-examination.

Whereupon the plaintiff rested his case.

Which was all the evidence offered or received upon the trial of the above-entitled case.

[fols. 297-306] And thereupon, immediately at the close of all the evidence and before any further proceedings were had in said cause, counsel for defendant made and filed the following motion in writing, to-wit:

Motions for directed verdict and entries showing overruling of same omitted; printed side page 94 ante.

[fol. 307] Plaintiffs Requested Instructions to Jury Given

Plaintiff's Given Instruction "1"

Neither by these instructions, nor by any words uttered or remark made by the Court during this trial, does or did the Court intimate or mean to give, or wish to be understood as giving, an opinion as to what the proof is or what it is not, or what the facts are in this case or what are not the facts therein. It is solely and exclusively for the jury to find and determine the facts, and this they must do from

the evidence, and, having done so, then apply to them the law as stated in these instructions. The instructions given to the jury are and constiute one connected body and series, and should be so regarded and treated by the jury; that is to say; they should apply them to the facts as a whole, and they must not detach or separate any one struction from any or either of the others.

[fol. 308] Plaintiff's Given Instruction "2"

The jury are instructed that if from the evidence and under the instructions of the court you find that the defendant was, on the 31st day of December, 1924, a common carrier by railroad, and that said defendant was, at the time and place in question on said date, engaged in commerce between certain states of the United States, and that plaintiff, on said date and at said time and place, was then employed by and at work for the defendant in such commerce, then the United States Statute, known as the Federal Employers' Liability Act is applicable to this case.

[fol. 309] Plaintiff's Given Instruction "3"

The jury are instructed that it is provided by an Act of Congress of the United States, which was in force as the law at the time of the accident in question, that every common carrier by railroad while engaging in commerce between any of the several states of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, for such injury resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment. It is further provided that in all actions brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages resulting from the injury of such employee, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

[fol. 310] Plaintiff's Given Instruction "4"

The jury are instructed that while the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance or greater weight of evidence, yet the jury are further instructed that the preponderance of evidence in a case is not necessarily determined alone by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of evidence is, the jury should also take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify, their conduct or demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements, in view of and in connection with all the other evidence, facts and circumstances proved on the trial, and from all of these circumstances and all the evidence in this case determine upon which side is the greater weight or preponderance of the evidence.

[fol. 311] Plaintiff's Given Instruction "5"

The jury are instructed that if, after fairly and impartially considering the testimony of all the witnesses in this case, and the evidence and facts and circumstances in evidence before you in this case, you believe from the evidence that the plaintiff, at the time of and prior to the accident in question, exercised that degree of care for his own safety that an ordinarily prudent person would have exercised under the same circumstances and conditions as shown by the evidence in this case, then you are instructed that the plaintiff at and before the time of the accident in question was in the exercise of ordinary care for his own safety.

[fol. 312] Plaintiffs Given Instruction "6"

The jury are instructed that they, under the instructions of the court and from the evidence, are the sole judges of all the questions of fact in this case, and the court does not, by any instruction given the jury in this case, intend to instruct the jury how they should find any question of fact.

Plaintiff's Given Instruction "7"

Contributory negligence is the negligent act of plaintiff which concurring and co-operating with the negligent act of defendant is the proximate cause of the injury. If you find that the plaintiff was guilty of contributory negligence, the act of Congress under which this suit is brought provides, that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence as compared with the combined negligence of himself and the defendant.

[fol. 313] Plaintiff's Given Instruction "8"

If you believe from the evidence that any witness in this case has knowingly and willfully sworn falsely on this trial as to any matter material to the issues in this case, then you are at liberty to disregard the entire testimony of such witness, except in so far as it has been corroborated—if it has been so corroborated—by other credible evidence or by facts and circumstances proved on the trial.

[fol. 314] Plaintiff's Given Instruction "9"

The Court instructs the jury that if from the evidence and under the instructions of the Court you find for the plaintiff, and further find that the plaintiff was guilty of no negligence contributing to his injury, then, in determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to and they should take into consideration all the facts and circumstances pertaining to his injuries as proved by the evidence before them, the nature and extent of plaintiff's physical injuries resulting from the accident in question, if any, so far as the same are shown by the evidence; his suffering in body, if any, resulting from such injuries, and such future suffering and loss of health, if any, as the jury may

believe from the evidence before them in this case he will sustain by reason of such injuries; his loss of time and inability to work, if any, on account of such injuries; and may find for him such sum as in the judgment of the jury, under the evidence and instructions of the Court in this case, will be a fair compensation for the injuries he has sustained or will sustain, if any, so far as such damages and injuries, if any, are shown by the evidence to be a direct result of the accident in question and are claimed and alleged in the declaration.

[fol. 315] To the giving of which said Instructions numbered Plaintiff's Given Instructions one to 9 inclusive, and to each of them, the Defendant, by its counsel, then and there duly excepted.

And thereupon the Plaintiff, by his counsel, requested the Court to give to the Jury the following instruction numbered Plaintiff's Refused Instruction One:

PLAINTIFF'S REQUESTED INSTRUCTION TO JURY REFUSED

Plaintiff's Refused Instruction "1"

The Plaintiff is not bound to prove his case beyond a reasonable doubt, but is only bound to prove it by a preponderance of the evidence. If the jury find that the evidence bearing upon the issue in this case preponderates in his favor, although but slightly, it would be sufficient to justify a finding of the issues in his favor.

[fol. 316] But the Court refused to give to the Jury said instruction numbered Plaintiff's Refused Instruction One. To which ruling of the Court, the Plaintiff, by his counsel, then and there duly excepted.

And thereupon the Court gave to the Jury, on behalf of the Defendant, the following instructions in writing, numbered Defendants Given Instructions One to 14 Inclusive:

Defendant's Requested Instructions to Jury Given

Defendant's Given Instruction "1"

The Plaintiff is required to establish his case by a preponderance of the evidence before he can recover. If the Plaintiff in this case has not so established his case, or if the evidence is evenly balanced, or if you are unable to say on which side is the preponderance, then, in either of these cases, the verdict should be in favor of the Defendant.

[fol. 317] Defendant's Given Instruction "2"

In determining upon which side the preponderance of evidence is, the jury may take into consideration the number of witnesses testifying upon one side or the other of a disputed point, the opportunities of the several witnesses for seeing or knowing the things about which they testified, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements, and from all these circumstances, together with all the other facts and circumstances appearing from the evidence upon the trial, determine upon which side is the greater weight or preponderance of evidence.

[fol. 318] Defendant's Given Instruction "3"

The burden of proof is not upon the Defendant to show that it is not guilty of the negligence charged in the Declaration, or any count thereof, but the burden is upon the Plaintiff to prove that the Defendant is guilty of the negligence charged in plaintiff's Declaration, or some count thereof, and this rule as to the burden of proof is binding and must govern you in deciding this case. You have no right to disregard said rule or to adopt any other in lieu thereof, but in considerating said evidence and coming to a verdict you should adhere strictly to said rule as you must to all rules of law given to you by these instructions.

Defendant's Given Instruction "4"

Sympathies for the disabilities of the Plaintiff, if you believe they exist, should have no influence upon you in de-

termining whether or not the defendant is liable, or if liable, control in any way the amount of your verdict. The question of whether or not the Defendant is liable is to be determined from the evidence under the instructions of the Court; prejudice, sympathy or any outside matter should not in any way affect your determination of this or any other question in this case.

[fol. 319] Defendant's Given Instruction "5"

The fact that the court has given any instructions on the subject of Plaintiff's damages, or injuries, or that Defendant's counsel has discussed such subject, is not to be taken by you as any intimation by the court as any admission by the Defendant of the Defendant's liability for the injury complained of.

Defendant's Given Instruction "6"

If you believe from the evidence, under the instructions of the Court, that the injury to the Plaintiff was the result of a mere accident, which occurred without negligence on the part of the Defendant, charged in the Declaration, then the Plaintiff cannot recover.

[fol. 320] Defendant's Given Instruction "7"

Where an employment is attended with danger, a man engaging in it assumes the hazard of the ordinary perils which are incident to it; and if he receives an injury from an accident, which is an ordinary peril of the service undertaken by him, he cannot recover damages for such injury.

Defendant's Given Instruction "8"

The Plaintiff, when he entered the service of the Defendant, impliedly agreed that he would assume all risks which are ordinary and naturally incident to the particular service in which he engaged and, if you believe from the evidence, that the injury to the Plaintiff was only the result of one of the risks ordinarily incident to the work in which Plaintiff was engaged, and not otherwise, then he cannot recover in this case and your verdict should be for the Defendant.

[fol. 321] Defendant's Given Instruction "9"

If you believe from the evidence, under the instructions of the Court, that the injury to the Plaintiff was caused solely by his own negligence, you must find the Defendant not guilty.

Defendant's Given Instruction "10"

While you are the judges of the credibility of the witnesses, you have no right to disregard the testimony of an unimpeached witness sworn on behalf of the Defendant, simply because such witness was or is an employee of the Defendant, but it is your duty to receive the testimony of such witness in the light of all the evidence, the same as you would receive the testimony of any other witness, and to determine the credibility of such employee by the same principles and tests by which you determine the credibility of any other witness.

[fol. 322] Defendant's Given Instruction "11"

While Plaintiff in the case has the right to testify in his own behalf, nevertheless you have the right, in weighing his evidence, to determine how much credence is to be given to it, and to take into consideration that he is the plaintiff and interested in the result of the suit.

Defendant's Given Instruction "12"

You are not bound to believe anything to be a fact, simply because a witness stated it to be so, provided you believe from all the evidence that such witness is mistaken or has testified falsely as to such fact.

Defendant's Given Instruction "13"

If you believe from the evidence, under the instructions of the Court that the Defendant is not guilty of the negligence charged then you have no right to compromise the question of Defendant's Liability and grant the Plaintiff some amount merely because he may have been injured on the occasion in question.

[fol. 323] Defendant's Given Instruction "14"

If, under the instructions of the Court, you find, from the evidence in this case, that the Plaintiff is not entitled to recover, then you will have no occasion to consider at all the question of damages.

To the giving of which said Instructions numbered Defendant's Given Instructions One to 14 inclusive, and to each of them, the Plaintiff, by his counsel, then and there duly excepted.

And thereupon the Defendant, by its counsel, requested the Court to give to the Jury the following Instruction, numbered Defendant's Refused Instructions one to 4 inclusive:

Defendant's Requested Instructions to Jury Refused

Defendant's Refused Instruction "1"

The Declaration in this case is merely the unsworn statement of what the Plaintiff alleges and it neither proves nor tends to prove any allegation contained in it in relation to this case.

[fol. 324] Defendant's Refused Instruction "2"

The Plaintiff in undertaking to work for the Defendant Company, and thereafter working in the yard of such Company, assumed all the risks of injury whilst working in that capacity, which existed in the carrying on of the business in the usual and ordinary manner.

Defendant's Refused Instruction "3"

If you find from the evidence that, at the time the Plaintiff was injured, the headlight on the locomotive was dim and such locomotive as being operated in the usual and ordinary manner, and that the cabooses in question were being shoved in the usual and ordinary manner, you should find the Defendant not guilty.

[fol. 325] Defendent's Refused Instruction "4"

If you believe from the evidence that the Plaintiff applied to the Defendant for a postion as switchman and submitted himself to a physical examination, as requested by the Defendant, and was rejected because he did not meet the physical requirements of the Defendant, and that thereafter the Plaintiff applied for a position with the Defendant under a name not his own and procured another person to take the necessary physical examination required by the Defendant, and that said person did meet the physical requirements, and that thereafter the Plaintiff commenced to work for the Defendant without having been examined and accepted as having met the physical requirements of the Defendant, then you should find the Defendant not guilty.

But the Court refused to give the jury said Instructions numbered Defendant's Refused Instructions one to 4 inclusive. To which ruling of the Court in refusing to give to the Jury said Instructions numbered as aforesaid, the Defendant, by its counsel, then and there duly excepted.

And thereupon the Jury retired and thereafter returned a verdict against the Defendant, in words and figures as follows:

[fol. 326] VERDICT

We the Jury find the Defendant guilty and assess the Plaintiff's damages at the sum of Fifteen thousand dollars ($15,000.00).

Arthur A. Knowles, Foreman. J. H. Devine, Otto Beck, W. A. Bodine, John Lenihan, Benj. E. Reynolds, Wm. Wilson, H. R. Lodge, Stuart D. Lyon, Joseph Halcasz, Kenneth McLay, Harold Knipschild.

[fol. 327] MINUTE ENTRIES

Whereupon the Defendant, by its counsel, then and there moved that said verdict be set aside and that a new trial

be granted in said cause. Which motion for a new trial was denied by the Court.

To which ruling of the Court in so denying the said motion for a new trial, the Defendant, by its counsel then and there duly excepted.

Whereupon the Defendant, by its counsel, moved the Court to arrest the Judgment on said verdict, but the Court denied said motion.

To which said ruling of the Court, the Defendant, by its counsel, then and there duly excepted.

And thereupon, on the 23rd day of December, A. D. 1926, the Court entered judgment on said verdict for fifteen thousand dollars ($15,000.00).

To which said action of the Court in entering said Judgment, the Defendant, by its counsel, then and there duly excepted.

And thereupon the Defendant, by its counsel, prayed for and was allowed an appeal from said judgment to the Appellate Court of Illinois, within and for the First District of said State, upon filing its bond in the sum of eighteen thousand dollars ($18,000.00). The Court allowed said Defendant sixty (60) days from this day within which to file its Bill of Exceptions in said cause.

Which were all the proceedings had on the trial of said cause.

[fol. 328] In Circuit Court of Cook County

Order Settling Bill of Exceptions

And forasmuch as the matters and things hereinabove set forth do not fully appear of record, Defendant tenders this its Bill of Exceptions in said cause, and prays that the same may be signed and sealed by the Judge of said Court, pursuant to the Statute in such case made and provided, which is done accordingly this 28 day of January, A. D., 1927, in open court.

Walter Brewer, Acting Judge of the Circuit Court of Cook County, Illinois. (Seal.)

O. K. ——— ———, Attorney for Plaintiff. John L. McInerney, Attorney for Defendant.

[fol. 329] In Circuit Court of Cook County

[Title omitted]

Stipulation re Bill of Exceptions

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys of record, that the original Bill of Exceptions in said cause, in lieu of a copy thereof, may be incorporated in the Transcript of Record for use on appeal to or Writ of Error from the Appellate and Supreme Courts of the States of Illinois.

H. H. Patterson, Attorney for Plaintiff. John L. McInerney, Attorney for Defendant.

[fol. 330] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 331] In Appellate Court of Illinois

Assignment of Errors

And now comes Minneapolis, St. Paul, & Sault Ste. Marie Railway Company, a corporation, Appellant, by its attorney, and says that in the judgment, record and proceeding herein there are numerous manifest errors and reasons why the judgment herein should be reversed, and shows to the Court here the following errors of record:

1. The verdict is against the evidence.

2. The verdict is against the weight of the evidence.

3. The verdict is contravention of the law.

4. The verdict is inconsistent with the instructions to the jury.

5. The trial court erred in refusing to admit proper, competent and relevant testimony offered on behalf of appellant.

6. The trial court erred in refusing to permit proper questions to be asked of witnesses on the trial and in refusing to permit answers to proper questions, to the prejudice of appellant.

7. The trial court erred in refusing to permit proper questions to be asked of witnesses on the trial, and in refusing to permit answers to proper questions to the prejudice of appellant.

8. The trial court erred in admitting over the objections of appellant, improper, incompetent, irrelevant and immaterial testimony on behalf of appellee.

[fol. 332] 9. The trial court erred in refusing to exclude and strike out, on motion of appellant, improper, incompetent, irrelevant and immaterial evidence.

10. The trial court erred in excluding and striking out, on motion of appellee, proper evidence offered on behalf of appellant.

11. The trial court erred in putting and permitting improper and incompetent questions to be put to witnesses, to the prejudice of appellant on the trial.

12. The trial court erred in excluding proper evidence offered by appellant.

13. The trial court erred in admitting improper evidence offered by appellee.

14. The trial court erred in permitting improper questions to be put to witnesses, to the prejudice of appellant.

15. Counsel for appellee asked improper questions on the trial, to the prejudice of appellant.

16. The trial court erred in asking improper questions of witnesses, to the prejudice of appellant.

17. The trial court erred in refusing and overruling the motion of appellant to instruct the jury to find appellant not guilty at the close of appellee's evidence.

18. The trial court erred in refusing to instruct the jury to find appellant not guilty at the close of appellee's evidence.

19. The trial court erred in refusing and overruling the motion of appellant to instruct the jury to find appellant not guilty at the close of all the evidence in the case.

[fol. 333] 20. The trial court erred in refusing to instruct the jury at the close of all the evidence to find appellant not guilty.

21. The trial court erred in refusing to give proper instructions asked by appellant.

22. The trial court erred in improperly modifying instructions asked on behalf of appellant and in giving them to the jury as modified.

23. The amount of damages assessed in said verdict is highly excessive and manifestly out of all proportion to the injury proved on the trial.

24. The amount of the verdict is excessive.

25. The trial court erred in making improper and erroneous rulings in the course of the trial.

26. The trial court erred in overruling the motion of appellant for a new trial.

27. The court erred in overruling the motion of appellant in arrest of judgment.

28. The declaration, even after verdict, is insufficient to support the judgment.

29. The trial court erred in entering judgment on the verdict in favor of appellee and against appellant.

30. The amount of the judgment is excessive.

31. The judgment as to appellant is erroneous.

32. The verdict and judgment is contrary to the Fifth Amendment to the Constitution of the United States of America, in that as a result of said verdict and judgment, appellant will be deprived of its property without due process of law.

[fol. 334] 33. The trial court erred in giving to the jury, over the objection of the appellant, improper instructions asked on behalf of appellee.

34. The verdict and judgment are contrary to the provisions of an Act of Congress of the United States known as the Federal Employers' Liability Act.

Wherefore appellant prays that the judgment of the Circuit Court be reversed.

John L. McInerney, Attorney for Appellant.

[fol. 335] In Appellate Court of Illinois, First District

Term No. 303. Gen. No. 31914

John Rock, Appellee,

vs.

Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a Corporation, Appellant

Appeal from Circuit Court, Cook County

Hon. Walter Brewer, Presiding Judge

Additional Assignment of Error—Filed June 21, 1927

The verdict and judgment is contrary to the Fourteenth Amendment of the Constitution of the United States of America, in that, as a result of said verdict and judgment the appellant would be deprived of its property, without due process of law and denied the equal protection of the laws.

Wherefore appellant prays that the judgment of the Circuit Court be reversed.

John L. McInerney, Attorney for Appellant.

[File endorsement omitted.]

[fols. 336-339] Clerk's certificate to transcript omitted in printing.

[fol. 340] [Caption omitted]

[fol. 341] In Appellate Court of Illinois

Order Assigning Cause—March 4, 1927

On the Court's own motion it is ordered that the following numbered cases on the March Term Calendar, A. D. 1927 of said Court be and the same are hereby assigned to the Second Division Appellate Court for hearing and determination, to-wit: 31914, John Rock vs. Minneapolis, St. Paul & Sault St. Marie Ry.

[fol. 342] In Appellate Court of Illinois

[Title omitted]

Order Extending Time—April 19, 1927

This day came Appellant by its Counsel and moved the Court to extend the time 30 days from April 25, A. D. 1927, in which to file its abstracts and briefs in the above entitled cause as per affidavit filed herein. And the Court being fully advised in the premises doth order that said time be and the same is hereby so extended.

Minute entry of submission June 7, 1927, omitted in printing.

[fol. 343] In Appellate Court of Illinois

[Title omitted]

Order Allowing Motion for Leave to Assign Additional Errors—June 21, 1927

This day came Appellant by his Counsel and moved the Court for leave to assign additional errors upon the transcript of record filed in said cause as per affidavit filed

herein. And the Court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

In Appellate Court of Illinois

[Title omitted]

[fol. 344] Order Extending Time—June 21, 1927

On motion of Appellee to extend the time 30 days from June 27, A. D. 1927 to which to file his briefs in said cause as per Affidavit filed herein. It is ordered by the Court that said time be and the same is hereby extended 20 days from June 27th A. D. 1927.

[Title omitted]

July 13, 1927.

On motion of Appellee this day made in open Court to extend the time to and including August 16, A. D. 1927 in which to file his briefs in said cause, It is ordered by the Court that said motion be and the same is hereby alowed.

[fol. 345] [Title omitted]

Oct. 4, 1927.

This day came Appellant by its Counsel and moved the Court for leave to file its reply brief in said cause 10 days from August 26th, A. D. 1927 or in the alternative for leave to file said reply brief instanter as per affidavit filed herein. And the Court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

IN APPELLATE COURT OF ILLINOIS

No. 31914

JOHN ROCK, Appellee,

vs.

MINNEAPOLIS, ST. PAUL AND SAULT ST. MARIE RAILWAY COMPANY, a Corporation, Appellant.

JUDGMENT—Feb. 14, 1928

On this day came again the said parties, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the record and pro- [fol. 346] ceedings aforesaid, nor in the rendition of the Judgment aforesaid is there anything erroneous, vicious, or defective; and that in the record there is no error: Therefore, it is considered by the Court that the Judgment aforesaid, be Affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said Appellee recover of and from the said Appellant his costs, by him in this behalf expended, to be taxed, and that he have execution therefor.

IN APPELLATE COURT OF ILLINOIS

[Title omitted]

ORDER STAYING MANDATE—Feb. 28, 1928

The Court having considered the motion of Appellant that the issuance of the mandate herein be stayed until the time for the filing of a petition in the Supreme Court of Illinois for a writ of certiorari to review the Judgment of this Court in said cause shall have expired without any such petition having been filed, and if such petition for said writ shall have been filed within the proper time, then

until said writ of certiorari shall have been granted or refused; and the Court, being fully advised in the premises, doth grant said motion and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

[fol. 347] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 348 & 348½] In Supreme Court of Illinois

Assignment of Errors

The petitioner, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, by its attorneys, comes and says that in the judgment, record and proceedings herein there are numerous and manifest errors and reasons why the judgment of the Appellate and Circuit Court should be reversed and shows the Courts here the following errors of record.

I

The Appellate Court erred in affirming the judgment of the Circuit Court.

II

The Appellate Court erred in not reversing the judgment of the Circuit Court.

III

The judgment of the Appellate Court is contrary to law.

IV

The judgment of the Appellate Court is contrary to the evidence.

V

The judgment of the Appellate Court is contrary to admitted facts in the case.

VI

The judgment of the Appellate Court is not in accordance with the law and the facts.

VII

On the whole of the record the judgment of the Trial Court should have been reversed by the Appellate Court.

VIII

The Appellate Court erred in failing and refusing to reverse the judgment of the Circuit Court upon the Assignment of Errors filed in said Appellate Court.

IX

The refusal of the Circuit Court to direct a verdict for the defendant and its further action in entering judgment against the defendant on the verdict of the jury, and the refusal of the Appellate Court to reverse the judgment of the Circuit Court, are in der-ogation of the rights of the defendant under the Federal Employers' Liability Act, and deprive defendant of its property without due process of law. Under said judgment of the Circuit Court and the affirmance thereof of the Appellate Court, the defendant is further denied the equal protection of the laws, all in violation of the Fifth and Fourteenth Amendments to the Constitution of the United tSates.

By reason whereof the petitioner prays that the judgment of the Appellate and of the Circuit Court may be reversed, etc.

Edward H. Murnane, John L. McInerney, Attorneys for Plaintiff in Error.

[fol. 349] [File endorsement omitted]

[fol. 349-1] IN SUPREME COURT OF ILLINOIS, JUNE TERM, A. D. 1928

JOHN ROCK, Respondent,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Petitioner

Petition for Writ of Certiorari to Appellate Court of Illinois, First District, There Heard on Appeal from Circuit Court, Cook County

Honorable Walter Brewer, Presiding Judge

PETITION FOR WRIT OF CERTIORARI—Filed May 2, 1928

Opinion of Appellate Court

303-31914

JOHN ROCK, Appellee,

v.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Appellant

Appeal from Circuit Court, Cook County

Mr. Justice SCANLAN delivered the opinion of the Court.

This is an appeal from a judgment of the Circuit Court of Cook County for $15,000 in an action on the case, brought by the plaintiff, John Rock, against the defendant, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, for damages for injuries sustained by him in an accident while working as a switchman for the defendant. The case was tried before the court with a jury and a [fol. 349-2] verdict was returned against the defendant for $15,000. The declaration alleges that the plaintiff was an employee under the provisions of the Federal Employers' Liability Act, and the defendant admits that he was.

The suit is brought in the name of John Rock, but the real name of the plaintiff is Joe Rock, and the defendant contends that "the suit was improperly brought in the name of a person who had no connection whatsoever with the accident; * * * that the judgment herein entered in favor of John Rock is wholly unwarranted." It appears that the plaintiff made two applications for work with the defendant company. In the first he gave his real name and in the second he gave the name of John Rock. The night yardmaster of the defendant testified that on the occasion of the second application he gave the plaintiff a letter to the superintendent in which the plaintiff was named "John Rock" or "J. J. Rock"; that everybody called him Joe; that he is known there to this day as Joe Rock; that he put the plaintiff to work as John Rock, but that he knew he had been called Joe right along. The testimony of the plaintiff is to the effect that when he made the second application the yardmaster knew that he was the same person who had been rejected under the first application. It is clear from the record that the plaintiff in the instant case is the person who sustained the injuries for which the suit was brought. The defendant did not file or offer to file a plea in abatement, and "a misnomer of the plaintiff can only be pleaded in abatement and is no ground for setting aside the proceedings." (Springfield Ry. Co. v. Hoeffner, 175 Ill. 634, 644. See also Salisbury v. Gillett, 2 Scam. 290; Moss v. Flint, 13 Ill. 571.) Had the defendant in the present case seen fit to file a plea in abatement the plaintiff might have amended the pleadings so as to make then show his real [fol. 349-3] first name, or he might have filed a replication to the plea that he was as well known by the name of John Rock as by the name of Joe Rock. The defendant cites in support of its contention Pinckard v. Milmine, 76 Ill. 453, and Schmidt v. Thomas, 33 Ill. App. 109. Neither of these cases supports the contention of the defendant. In the first the defendant filed a plea in abatement averring that "said Edwin C. Bodman, one of the plaintiffs, was named Edward C. Bodman, and not Edwin C. Bodman," and the plea was in all respects formal. The plaintiffs filed a replication to the plea that neither traversed the allegation of misnomer nor replied that the plaintiff was known as well by one name as the other. The defendants filed a general demur-

rer to the replication which the trial court overruled. The Supreme Court merely held that as the replication did not tender a proper and triable issue, the demurrer should have been sustained, but in the present case the defendant did not see fit to properly challenge the misnomer of the plaintiff, and they will not be now heard to complain of the same. Even a defendant, sued under a wrong name, must take advantage of the misnomer by plea in abatement and if he does not he will be concluded by the judgment of decree rendered, the same as if sued in his true name. (Penna. Co. v. Sloan, 125 Ill. 72; Proctor v. Wells, 262 Ill. 77.) In Schmidt v. Thomas, supra, it appears that the summons named Mathias Schmidt and Mrs. Schmidt as defendants, and the return of the sheriff showed the summons was served on the "defendants Mathias Schmidt and Mrs. Schmidt." A declaration stating a joint cause of action was filed against "Mathias Schmidt and his wife, Mrs. Harriet C. Schmidt, whose other name is unknown to the plaintiff." A judgment by default was rendered against "the said defendants Mathias Schmidt and Mrs. Schmidt." It was held that [fol. 349-4] the law does not recognize the abbrev-ation "Mrs." as the name of an individual and that therefore the judgment by default was erroneous. The court states, however, that if it had been a judgment after a contest, and if it appeared that justice had been done, the error might have been disregarded. This case, on the point in question has never been cited but once (Dale, et al. v. Keefe, 178 Ill. App. 262, and there the court refused to follow the ruling in Schmidt v. Thomas, supra.) The latter case, on the facts has no application to the instant contention and it is apparent from the opinion that the court used an old common law rule as a ground for setting aside a default judgment. The defendant argues that the special plea filed by it, alleging "that the plaintiff (not naming him) ought not to have or maintain his aforesaid action against this defendant, because it says that at the time of the committing of the grievances set forth in the declaration and each count thereof, or at any other time, the plaintiff was not employed by the defendant," saves the point. That plea is neither in form nor substance a plea in abatement, and it did not serve to bring any new issue into the case as under the plaintiff's declaration he was bound to show that he was

an employee of the defendant company. The proof is clear that he was. The contention of the defendant was not only not raised by a plea in abatement, but although the defendant has in the assignment of errors alleged thirty-four grounds for reversal of the judgment, in none of these is any reference made to it. We find no merit in it.

The proof shows that the plaintiff, under his real name, applied to the defendant for work as a switchman October 1, 1923. His application was rejected because he had been operated on for a rupture, appendicitis and abscesses of the stomach. Then, under the name of John Rock—that being the name of a brother—he made a second application [fol. 349-5] October 18, 1923. This application was not in the handwriting of the plaintiff and when the time came for him to be physically examined he did not take the examination himself but sent a man named Lenhart, who pretended to be the plaintiff and underwent the physical examination. Thereafter, and until the accident, the plaintiff was employed by the defendant company—a period of about fourteen months. The defendant contends that "the fraud perpetrated upon the defendant by the plaintiff in his attempt to secure employment deprived him of the right to claim the benefits accruing to 'employees' under the provisions of the Federal Employers' Liability Act." The defendant concedes, in the oral argument, that the physical condition of the plaintiff at the time of the accident did not contribute in any way to his injury.

The only decision of an appellate court that the defendant cites that supports its contention is Norfolk & Western R. Co. v. Bondurant, 107 Va. 515. There the court held that a rule of a railroad company which forbids the employment of infants in its train service is a reasonable one, and that an infant who, with knowledge of such obtains service with the company by falsely representing himself to be of age, and is injured in the course of such service by reason of the negligence of the company's servants, cannot recover damages of the company for such injury, although his infancy in no way contributed to his injury; that his position is that of a trespasser, or at most a bare licensee, to whom the company stands in no contractual relation and owes no other duty than not to injure him recklessly, wantonly or wilfully. This ruling is based upon the decision in Fitz-

maurice v. New York, N. H. & H. R. R., 192 Mass. 159. After a careful consideration of this last decision, we have reached the conclusion that it is not an authority for the [fol. 349-6] ruling in the Virginia case. In the well considered case of Lupher v. A. T. & S. F. Ry. Co., 81 Kans. 585, the distinction between the two cases is so well pointed out that we will content ourselves by quoting therefrom:

"That case (Norfolk & Western R. Co. v. Bondurant, supra) in turn is founded expressly upon Fitzmaurice v. New York, N. H. & H. Railroad, 192 Mass. 159, and the citations in a note thereto in 6 L. R. A., n. s., 1146. The substance of the Massachusetts case is that one who uses a railroad ticket obtained at a reduced rate by fraudulent representations is not a passenger in the sense of being entitled to protection as such, and stands in no better position than a mere trespasser. This is the general doctrine, to which there seems to be no dissent. (6 Cyc. 538.) The Virginia court took the view that by parity of reasoning one who obtains employment from a railway company by a false stat-ment as to his age is prevented by his fraudulent act from becoming an employee. We think the two situations are obviously dissimilar. The analogy is not close enough to warrant the application of the same rule. Among other differences may be noted this: In the one instance a person desiring to be transported from one point to another fraudulently procures the railway company to render him that service, a service which is wholly for his benefit and in which the company has no interest whatever; he obtains by false pretenses something of value to himself for which he renders no equivalent. In the other the seeker of employment does, it is true, procure his contract by false representations, but having obtained it he begins the performance of service for the benefit of the company and renders it an equivalent for all that he receives from it. True, the company could at its option upon discovery of the deceit discharge him at any moment (26 Cyc. 989), but even then he would be entitled to compensation for the time he had served, not necessarily at the agreed rate, but according to the reasonable value of his services. (Anstee v. Ober, 26 Mo. App. 665.) The relation of master and servant exists in virtue of the one party performing valuable services which are accepted and paid for by the other."

[fol. 349-7] The only other case cited by the defendant, where the facts are analogous to those of the case at bar, is Stafford v. Baltimore & O. R. Co., 262 Fed. Rep. 807. This decision was by a nisi prius court and it was rendered on a motion by the plaintiff to strike a special plea of the defendant alleging that the plaintiff, being over the age prescribed by the rules of the company and unable to pass the physical examination required by the rules, procured another, who was competent, to make application and take the examination, and by means of a certificate thus obtained, secured the position. The decision denying the motion to strike was largely based upon Norfolk & Western R. Co. v. Bondurant, supra. The court held that a number of questions might arise on the trial that could not be determined in advance on the motion to strike the plea and that "without further discussion, it seems to me clear, whatever principle may be applied, that it cannot be here relied on to the extent of rejecting this plea offhand, and forbidding the matters set up in it, if proven, from becoming pertinent to the issues to be determined on the trial." It would seem fairly clear from a reading of the decision that the trial court did not intend to hold that the mere fraudulent act of the employee in obtaining employment prevented the relation of master and servant from existing between him and the railroad company at the time he was injured. The motion in Stafford v. Baltimore & O. R. Co., supra, was decided in November, 1919. In October, 1922, Payne v. Daugherty, 283 Fed. Rep. 353, was decided by the Circuit Court of Appeals, Eighth Circuit. That decision is clearly adverse to the present contention of the defendant. There the court says:

"A principal contention, embraced in a number of assignments, is that the trial court erred in excluding evidence offered to defeat the action, on the ground that the plaintiff fraudulently secured his employment, as pleaded, and in [fol. 349-8] refusing instructions tendering such defense. In our opinion, the rulings were correct. The complaint is not that proof is incompetent which tended to attribue the fall from the car to prior injury or affliction. That is far different from permitting a retroactive dissolution of the relation of master and servant, by virtue of the contract,

which, even if voidable, was, while it subsisted, attended with the duty, required by law, for the safety of the latter. Cases are cited involving different facts, but of contrary import in principle. We regard the decisions such as Lupher v. Atchison, T. & S. F. Ry. Co., 81 Kan. 585, 106 Pac. 284, 25 L. R. A. (N. S.) 707, as declaring the sound and just rule, namely, that there is liability to the employee, notwithstanding the inducement to the contract."

Lupher v. A. T. & S. F. Ry. Co., supra, is, apparently, the leading case on the present question. It is so considered in Payne v. Daugherty, supra. We have heretofore quoted from the Kansas case sufficiently to show that it is directly opposed to the contention of the defendant. In Baker v. Beattie, 222 S. W. 658, the facts are analogous to those in the instant case. The Court of Civil Appeals of Texas, in overruling the contention of the defendant that the contract of employment between the parties was void and the relation of master and servant did not exist, said:

"The contract of employment not being rescinded or canceled at the time of the injury, the appellee would be held to be an employe of the appellant. The contract of employment would not be absolutely void because of the alleged fraudulent statements. The alleged fraudulent statements would only afford grounds for a voidance or annulment of the contract of employment at the option of the company. And until the contract of employment was actually terminated by the company on the ground of the alleged fraudulent statements, the relation of master and servant would legally continue and exist."

(See also Lake Shore & M. S. R. Co. v. Baldwin, 19 Ohio C. C. 338.)

[fol. 349-9] A number of cases might be cited in which the courts have held that if a minor applicant for employment untruthfully represents himself to be of age in order to secure employment, and such representation is believed by his employer, he is not thereby barred from a recovery for injuries which he may suffer by the negligence of his employer, but we do not, however, regard these causes as having the same force as cases in which adults are involved, for the reason that statutory provisions and questions of public policy seem to enter into cases where minors are concerned.

After a careful consideration of the question, we have reached the conclusion that at the time the plaintiff sustained the injury in question the relation of master and servant existed between him and the defendant, and the contention of the defendant is, therefore, not sustained.

The defendant contends that "the verdict of the jury is contrary to the manifest weight of the evidence." In the brief of each party pages are devoted to this contention and the weight of the facts and circumstances and the credibility of the witnesses are therein discussed at great length. In our judgment it would serve no useful purpose to set out and review the evidence of the respective parties. We are satisfied, after a very careful consideration of the present contention, that we cannot say that the verdict of the jury is contrary to the manifest weight of the evidence. The plaintiff testified that a bright headlight on the Belt transfer engine blinded him so that he could not and did not see the caboose train that struck him coming until it was about ten feet away from him. The defendant strenuously contends that the evidence overwhelmingly shows that the headlight upon the transfer engine at the time of the accident was a dim one, and apparently argues that if it be conceded [fol. 349-10] that the light was a dim one the case of the plaintiff falls. Without passing upon the contention of the defendant that the testimony of the plaintiff as to the light is without corroboration in the evidence, nevertheless, if it be assumed that the light was dim, still, as we read the record, the plaintiff made out a clear prima facie case of negligence against the defendant. It must be noted in this connection that the first count of the declaration is a general negligence count. In its argument the defendant apparently insists that the plaintiff was guilty of negligence. The burden of proving contributory negligence under the Federal Employers' Liability Act is on the defendant (Fisher v. Chicago, R. I. & P. R. Co., 280 Ill. 49), and even if the plaintiff was guilty of contributory negligence, that fact, alone, would not bar a recovery but would mitigate the damages (Fisher v. Chicago, R. I. & P. R. Co., supra), and in the present case the jury was properly instructed on that subject, and as the defendant does not complain of the amount of the verdict it is fair to assume that defendant is satisfied that the jury, if it found the plaintiff guilty of

contributory negligence, took that fact into consideration in assessing the damages.

The defendant contends that "the plaintiff is not entitled to recover for the injuries claimed, because such injuries resulted from the dangers incident to his employment, the risk of which he assumed."

The accident occurred between 8 and 9 p. m., and at a point where certain lead tracks lead from the main lines to switch tracks. The plaintiff at the time was crossing the tracks at a crossway that employees habitually used in going about their work. The plaintiff saw a Belt Line train, consisting of about eighty cars, approaching from the south at a very slow speed, and it was natural for him to start across the tracks, in front of that long train, in order [fol. 349-11] to get back to his work, as his "lunch" period was about up, and it would seem that he had time to safely cross in front of it. In any event, he did pass in front of it safely. About the time that he started to cross the tracks there was standing on a track fifteen feet beyond that upon which the Belt Line train was approaching, and east of it, a train made up of an engine and tender and two cabooses. This train, apparently about the time that plaintiff was crossing in front of the Belt Line train, and without the knowledge of the plaintiff, was started northward, with the cabooses in front, was shoved by the engine between twenty and thirty-five feet, when the plaintiff, who was then passing over the track upon which the caboose train was coming, was hit by the foremost caboose and sustained the injuries of which he complains. It is clear from the evidence that there was no ringing of the bell on the locomotive of the caboose train, nor was there any signal or warning given of the start or approach of this train, nor was there any lookout with a light on the foremost caboose. In fact, the defendant offered no proof to the contrary and its contention, with reference thereto, is that the plaintiff assumed the risk incident to such a method of operation. It was the intention of the crew of the caboose train to cut the cabooses from the engine and tender and to "kick them" onto a switch track. The plaintiff introduced evidence that it was the custom and practice when cars and cabooses were shoved at night over the lead track where this accident happened,

to have a man on the foremost car with a light. The defendant introduced evidence to rebut that offered by the plaintiff, but after a careful analysis of all the testimony in relation thereto, we are satisfied that the jury were warranted in finding that there was such a custom. The accident occurred at night, and the manner in which the caboose train [fol. 349-12] was handled showed such a disregard for the safety of the employees that might be using the crossway that the jury, in view of all the facts and circumstances bearing on the subject, might well have refused to believe the contention of the defendant that the method of operation of the caboose train at the time and place in question was a customary one and known to the plaintiff. At the request of the defendant the trial court instructed the jury fully as to the law of assumed risk. It was a question of fact—not of law—whether the injury received by the plaintiff was occasioned by or through a peril of his employment, the risk of which he had assumed. The jury, by their verdict, have found in favor of the plaintiff on this issue and we feel that we should not be justified in disturbing this finding.

The only other contention of the defendant amounts to an assertion that the defendant has the right to have the present judgment passed upon by the federal courts.

The defendant makes no complaint as to any instructions given or refused, nor as to any ruling of the trial court in the matter of evidence, nor that the amount of the verdict is excessive. Neither the conduct of the trial court nor the counsel for the plaintiff is criticized, and it would appear that the defendant has had a fair and impartial trial.

The judgment of the Circuit Court of Cook County is affirmed.

Affirmed.

Barnes, P. J., and Gridley, J., concur.

[fol. 349-13] Further Statement

An examination of the record and opinion of the Appellate Court indicates clearly that many factors in the record have been overlooked, and that the court has based its opinion on the vital questions upon inapplicable and erroneous principles of law. Your petitioner desires, therefore, respectfully to present to this court, a short statement,

pointing out wherein it considers there are serious errors in the opinion of the Appellate Court.

The portion of the opinion in which it is stated that defendant admits that plaintiff was its employee under the provisions of the Federal Employers' Liability Act, is wholly erroneous. It was admitted that plaintiff and defendant were, at the time of the injury, engaged in Interstate Commerce, but special pleas were filed which expressly denied that plaintiff was in the due course of his employment and expressly alleged that he was not employed by defendant at the time alleged in the declaration, or at any time. (Abst., 9 & 10; Rec., 18-21.)

In the opinion of the court it is further stated that in none of the assignments of error is reference made to the question of whether plaintiff was an employee of the defendant. It is respectfully suggested that the pleas above referred to, placed that question in issue and if the evidence fails to establish that he was such an employee, that point was saved on the assignment of errors in the Appellate Court, because in such circumstances it would have been the duty of the trial court to direct a verdict in favor of defendant. The Appellate Court correctly holds that, under plaintiff's declaration, he was bound to show that he was an employee of defendant. This plaintiff did not do. [fol. 349-14] The Appellate Court further found that, at the time plaintiff sustained the injury, the relation of master and servant existed between him and defendant. Assuming (which we do not concede) that the record sustains this finding, it does not decide the point of whether plaintiff, at the time in question, was entitled to the benefits of the Federal Employers' Liability Act. Although the conclusion of the court is based on the assumption that he was so entitled, it is submitted that the mere existence of the relation of master and servant, does not give right to a cause of action under the Federal Employers' Liability Act. By that Act, employers are, under proper circumstances, made liable to their employes. But the relation of employer and employee thereunder must rest upon a valid contract of employment. The very findings of the court negative such a contract. If the plaintiff had any right at all, it was at the common law.

The Appellate Court further finds that the jury, in view of all the facts and circumstances, might well have refused to believe the contention of defendant that the method of operation of the caboose train at the time and place in question, was a customary one, or was known to plaintiff. The record is to the contrary. The Appellate Court evidently overlooked the fact that plaintiff himself testified that he had worked as a switchman at various times on movements similar to the one that was made the night that he was injured; that such a movement was made sometimes every night, and that at times there was a light on the leading caboose, and at other times there was not; that he knew that on the track upon which he ran there might be cabooses backed up without lights, and that he had seen the movement before, both with and without lights. (Abst., 22; Rec., 79-81.)

The Appellate Court further overlooked the fact that there was no evidence whatever in the record tending to [fol. 349-15] prove that the plaintiff knew of a custom (if any there was) to operate movements similar to the one in question, with a man on the head end of the cabooses with a light and, of course, if he knew of no such custom he had no right to rely on it and did not rely on it; nor was there any evidence in the record tending to prove that the absence of such light was the proximate cause of the injury of the plaintiff. Plaintiff, in effect, admitted that he would not have seen the light had it been there, for he says he could see nothing. (Abst., 24; Rec., 85-86.) An examination of the abstract will disclose that the Appellate Court is in error, both as to its conclusions on fact and law.

Your petitioner now respectfully presents to the Court the points and authorities relied upon for reversal of the judgment in support of its contention, that the Appellate Court was in error set forth in full in the assignment of errors attached to the transcript of the record of the Appellate Court and the abstract of record.

[fol. 349-16] Points, Authorities and Suggestions

I

There was no proof of negligence on the part of the defendant.

Toledo, St. Louis & Western v. Allen, U. S. Sup. Ct. Decided Feb. 20, 1928. 72 L. Ed. (Adv. Ops. 267).

Boldt v. Pennsylvania R. R. Co., 245 U. S. 441, 445, 62 L. Ed. 120.

Ches. & Ohio Ry. v. Nixon, 271 U. S. 218.

Beecroft v. Great Northern Ry. Co., 134 Minn. 86.

Aerkfetz v. Humphreys, 145 U. S. 418; 36 L. Ed. 758.

Neidlein v. So. Pac. Ry. Co., 178 Pac. 131.

Hinson v. Atlanta & C. Air Line Ry. Co., 90 S. E. 772.

Olson v. C. R. I. & P. Ry. Co., 202 N. W. 490.

Lancaster v. St. L. & San Fran. R. Co., 261 Pac. 960.

(a) The Appellate Court does not pass upon the question of whether the headlight on the locomotive on the first track was dim or bright, but reaches the conclusion that plaintiff made out a clear prima facie case of negligence against defendant, even on the assumption that the light was dim, and finds in the opinion that the accident happened at a cross-way that the employes habitually used in going about their work. There is no evidence to sustain the finding with respect to the cross-way, nor was there any prima facie showing of negligence.

(b) The court found that the prima facie showing of negligence was (1) that there was no ringing of bell on the locomotive of the caboose train; (2) that there was no signal or warning given of the starting or approaching of that train; (3) that there was no look-out with a light on [fol. 349-17] the foremost caboose. As to the first two findings, it is respectfully submitted under the circumstances that failure to ring a bell, or give a warning, was not negligence. The accident happened to an employee within the yard limits and the defendant owed no duty to give any warning in connection with the caboose movement, for it was purely a switching movement. As to the third, the

Appellate Court failed to find that the evidence established the existence of a bright headlight, and we have a right to assume that it was of the opinion that the evidence did not establish that fact. But assuming even that the evidence showed it was a custom to operate with a light on the foremost caboose, plaintiff assumed the risk of there being none because he knew that such movements occurred both with and without lights. On the proposition of assumption of risk, please see suggestions and authorities under Point II. Attention is here directed to the fact that the case is covered by the Federal Employers' Liability Act, and the principles of common law as applied in the courts of the United States, and that plaintiff cannot recover in the absence of negligence on the part of defendant, proximately causing the injury complained of. There is not the slightest showing that a man with a light on the foremost caboose would have obviated this accident.

II

Plaintiff is not entitled to recover for the injuries claimed because such injury resulted from the dangers incident to his employment, the risk of which he assumed.

Gilmer v. Yazoo & M. V. R. R. Co., 4 Fed. (2d) 963; certiorari denied 268 U. S. 705; 69 L. Ed. 1167.

Davis & Phila. & R. Ry. Co., 276 Fed. 187.

Pryor v. Williams, 254 U. S. 43; 65 L. Ed. 120.

Boldt v. Penn. R. R. Co., 245 U. S. 441; 62 L. Ed. 385.

Jacobs v. Southern R. Co., 241 U. S. 229; 60 L. Ed. 970.

[fol. 349-18] Baugham v. N. Y. P. & N. R. Co., 241 U. S. 237; 60 L. Ed. 977.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492; 58 L. Ed. 1062.

Connelley v. Penn. R. Co., 228 Fed. 322.

Ross v. C. R. I. & P. Ry. Co., 243 Ill. 440.

Southern Railway Co. v. Simmons, 100 S. E. 5.

C. & N. W. Ry. Co. v. Donahue, 75 Ill. 106.

(a) As we have seen under Point I, failure to ring bell or give a warning was not negligence and if it can be said

that it was negligence to operate the cabooses in question without a light on the foremost caboose, the risk of injury due to that negligence was assumed by plaintiff. The risks arising from conditions created by negligence are (if the conditions be known) as completely assumed as are risks naturally incident to the employment.

III

Fraud perpetrated upon defendant by plaintiff in his attempt to secure employment, deprives him of the right to claim benefits accruing to an employee under the Federal Employers Liability Act.

Stafford v. B. & O. R. Co., 262 Fed. 807.

Morgan Munitions Co. v. Studebaker Corp., 226 N. Y. 94.

Norfolk & Western Ry. Co. v. Bondurant, 107 Va. 515; 15 L. R. A. (N. S.) 443.

Fitzmaurice v. N. Y. N. H. & H. R. Co., 192 Mass. 159; 6 L. R. A. (N. S.) 1146.

Mexican Amole Soap Co. v. Clarke, 72 Ill. App. 655.

(a) The plaintiff, after being rejected for physical unfitness, applied for employment in the name of his brother, a person in being, and fraudulently sent still another person to take the physical examination, because plaintiff well knew he was disqualified. This fraud made the contract of [fol. 349-19] employment void from the beginning. Insofar as it affects the rights of the parties, the Federal Employers' Liability Act is in derogation of the common law and imposes additional duties and obligations upon the defendant and gives corresponding additional rights to the plaintiff. A holding that the plaintiff has the right of recovery under the Federal Employers' Liability Act would completely set at naught the rules and regulations governing employment, enacted for the safety of passengers, property, other employes and the general public."

IV

The suit was improperly brought in the name of a person who had no connection whatsoever with the accident.

(a) Parties can sue only in their true names.
Pinckard v. Milmine, 76 Ill. 453.

(b) John Rock was neither an employee of, nor injured by the defendant herein, and the pleadings fail to disclose any right or authority in Joe Rock to prosecute this action brought in the name of John Rock. It was not necessary to file a plea in abatement to raise this question, because the matter arose on the trial of the case and plaintiff made no motion to amend.

[fol. 349-20] The refusal of the trial court to direct a verdict for the defendant and its further action in entering judgment against the defendant on the verdict of the jury, and the further action of the Appellate Court in affirming the judgment, are in derogation of defendant's rights under the Federal Employers' Liability Act, and deprive it of its property without due process of law. Under said judgment, the defendant is further denied the equal protection of the laws, all in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor, 210 U. S. 281; 52 L. Ed. 1061, 1067.

Seaboard Air Line Railway Company v. Duvall, 225 U. S. 477; 56 L. Ed. 1171, 1175.

St. Louis, Iron Mountain & Southern Ry. Co. v. McWhirter, 229 U. S. 265; 57 L. Ed. 1179, 1186.

New Orleans & Northeastern R. R. Co. v. Harris, 247 U. S. 367; 62 L. Ed. 1167.

VI

Whether there was any evidence in the record upon which the verdict could be sustained, is a question of law which was properly preserved for reveiw by this court, by the defendant's motion for an instructed verdict.

Abdill v. Abdill, 292 Ill. 231.

Key & Chappell Co. v. Penn. Co., 291 Ill. 248.

Your petitioner further represents that in the record of proceedings and judgment in the Circuit and Appellate Courts, manifest error intervened to the prejudice of peti- [fol. 349-21] tioner; that the judgment of the Circuit Court and the affirmation thereof by the Appellate Court are in derogation of defendant's rights under the Federal Employers' Liability Act, and deprive it of its property without due process of law; that under said judgment and affirmance thereof petitioner is further denied the equal protection of the laws all in violation of the Fifth and Fourteenth Amendments to the Constitution of the Unied States.

Your petitioner further represents that the said judgments of the Circuit and Appellate Courts are erroneous, illegal and unjust, and, except by this proceeding, your petitioner is unable to present to the court for review the correctness and propriety thereof.

Wherefore, petitioner prays that a writ of certiorari may be granted in the above cause in accordance with the statute in such case made and provided.

Respectfully submitted, John L. McInerney and Edward H. Murnane, Attorneys for Petitioner.

[fol. 349½] In Supreme Court of Illinois

[Title omitted]

Order Denying Certiorari—June 21, 1928

And now on this day the Court having duly considered the petition for a writ of Certiorari herein as well as the record, abstracts, brief and argument filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a writ of Certiorari herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by him in this behalf expended, to be taxed, and that he have execution therefor.

[fol. 350] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 351-363] Opinion, Scanlon, J., appellate court omitted. See petition for certiorari, printed side page 349 ante.

Endorsed on cover: File No. —. Illinois. Appellate Court, First District. Term No. —. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, petitioner, vs. John Rock. Petition for writ of certiorari and exhibit thereto. Filed September, 1928. File No. —.

(3160)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 29, 1928

The petition herein for a writ of certiorari to the Appellate Court of Illinois, First District, and/or to the Supreme Court of the State of Illinois is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4266)

Page

Boldt v. Penn. R. R. Co., 245 U. S., 441, 445; 62 L. Ed., 120 ... 27
Chesapeake & Ohio Ry. Co. v. Nixon, 271 U. S., 218 ... 17, 27
Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S., 472 ... 17
Chicago, R. I. & P. Ry. Co. v. Bond, 240 U. S., 449 ... 17
Chicago & Northwestern Ry. Co. v. Donahue, 75 Ill., 106 ... 27
Connelley v. Penn. R. Co., 228 Fed., 322; 201 Fed., 54, 57 ... 27, 30
Cundy v. Lindsay, 3 App. Cas., 459 ... 3
13 C. J., 378 ... 3
Davis v. Phila. & R. Ry. Co., 276 Fed., 187 ... 27
Fitzmaurice v. N. Y. N. H. & H. R. Co., 192 Mass., 159; 6 L. R. A. (N. S.), 1146 ... 25
Gilmer v. Yazoo & M. V. R. R. Co., 4 Fed. (2d), 983; certiorari denied 268 U. S., 705; 69 L. Ed., 1167 ... 27
Hinson v. Atlanta & C. A. L. Ry. Co., 172 N. C., 646 ... 30
Jacobs v. Southern R. Co., 241 U. S., 229; 60 L. Ed., 970 ... 27, 28
Lancaster v. St. L. & S. F. R. Co., 128 Okla., 176 ... 30
Mexican Amole Soap Co. v. Clarke, 72 Ill. App., 655 ... 25
Morgan Munitions Co. v. Studebaker Corp., 226 N. Y., 94 ... 25
Neiblein v. So. Pac. Ry. Co., 180 Cal., 63 ... 30
New Orleans & N. E. R. R. Co. v. Harris, 247 U. S., 367; 62 L. Ed., 1167 ... 18
Norfolk & Western Ry. Co. v. Boodurant, 107 Va., 515; 15 L. R. A. (N. S.), 443 ... 24, 25
Olson v. C., R. I. & P. Ry. Co., 102 Minn., 194 ... 30
Pryor v. Williams, 254 U. S., 43; 65 L. Ed., 120 ... 27
Redliff v. Dallinger, 141 Mass., 1 ... 3
Rooney v. Erie R. Co., 135 Fed., 311, 315 ... 30
Ross v. C., R. I. & P. Ry. Co., 243 Ill., 440 ... 27
St. Louis, etc., R. Co. v. McWhirter, 229 U. S., 265 ... 17
St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor, 210 U. S., 281; 52 L. Ed., 1061 (1067) ... 18
Seaboard A. L. Ry. Co. v. Duval, 225 U. S., 477; 56 L. Ed., 1171 (1175) ... 18
Seaboard A. L. Ry. Co. v. Horton, 233 U. S., 492; 58 L. Ed., 1062 ... 17, 27
26 Employers' Liability cases (Mondou v. N. Y., etc., R. Co.), 223 U. S., 1 ... 17
Stafford v. B. & O. R. Co., 262 Fed., 876 ... 25
Toledo, St. L. & W. v. Allen, 48 S. C., 215, 72 L. Ed., 267 ... 26, 28, 30

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 454

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

JOHN ROCK, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND OR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

To the Honorable the Supreme Court of the United States:

Petitioner respectfully represents that it is aggrieved by the final judgment in this cause of the Appellate Court of Illinois, First District, entered on February

Eighteen days later, October 18, 1923, respondent made a second application, but made it in the name of his brother, John Rock (R., 17). This second application respondent did not make in his own handwriting (R., 17). When asked by the superintendent (employing officer) whether he had not made a previous application, respondent allayed suspicion by stating that the previous applicant was his brother (R., 56, 57).

Respondent knew he would again be rejected if he took the physical examination (R., 44); he therefore procured a man named Adam Lenhart to take the examination in the name of John J. Rock (R., 18, 44, 57). Respondent took Lenhart to the doctors' office with him (R., 57); Lenhart went up to the doctors and said, "I am John J. Rock" (R., 57-58). Respondent sat in the waiting room while Lenhart was being examined as John Rock (R., 57). The doctors passed and accepted Lenhart, believing him to be John Rock (R., 58). Respondent then presented himself to the employing officer as John Rock thus certified as physically fit. In this manner respondent obtained work as a switchman under the name of John Rock and so continued for about fourteen months up to the time of the injury in question (R., 18, 34). It was not until later that petitioner discovered that this individual was the same person who had been rejected for physical defects, and whom it never knowingly employed in its train service operations (R., 44).

Respondent when injured brought this suit in the name of John Rock and the same was tried in his behalf, and judgment in his favor was entered and

sustained, entirely on the theory that he was an employee of the petitioner within the meaning of the Federal Employers' Liability Act, and that the provisions of that act applied. Petitioner by special plea denied that respondent was ever its employee (R., 8-10); and has at all times maintained by proper exceptions and assignments of error that by reason of the fraudulently procured mistake as to his identity under which he secured work as a switchman, the contractural relation of employer and employee never existed between the parties; hence that he was not an employee within the meaning of the Federal Employers' Liability Act.

II.

The second ground on which certiorari is here applied for need not be considered unless the first is decided adversely to our contention. It is that assumption of risk, a valid defense under this act, was established as a matter of law.

This Court declared in Toledo St. Louis & Western Railroad Company *vs.* Allen, 160, October term, 1927, decided February 20, 1928, 48 S. C. R., 215, on certiorari, in a case under this act, that:

> "If, upon an examination of the Record, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 454

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Petitioner,

vs.

JOHN BOOK, Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF NORTH DAKOTA, FIRST DISTRICT, AND TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA, AND BRIEF IN SUPPORT THEREOF.

HENRY B. MITCHELL,
JOHN H. PALMER,
1425 First Nat'l Bank Bldg.,
Minneapolis, Minnesota,
Counsel for Defendant and Petitioner.

JOHN L. McNEISHEY,
1201 Chicago Temple Bldg.,
Chicago, Illinois,
Of Counsel.

(32,763)

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Statement of matter involved	1
Reasons relied on for allowance of writ of certiorari	2
I. First question involved	2
II. Second question involved	7
III. Third question involved	11
IV. Errors assigned	12
V. Prayer	13
Brief	15
Citation of opinion of court below	15
Grounds on which jurisdiction of this court is invoked	15
1. Date of judgment of appellate court of Illinois to be reviewed and date of refusal of certiorari by Supreme Court of Illinois	15
2. Specific claims advanced and rulings made in lower court which are relied upon as a basis of this court's jurisdiction	15
3. Statutory provision under which this court's jurisdiction is invoked	17
4. Cases believed to sustain the jurisdiction of this court	17
Statement of the case	19
Specification of assigned errors intended to be urged	19
Summary of argument	20
Argument	21
Specification I	21
Specification II	25
Specification III	28

Table of Cases Cited.

American Ry. Exp. Co. v. Levee, 263 U. S., 19, 20	18
Aerkfeta v. Humphreys, 145 U. S., 418; 36 L. Ed., 758	30
Baughman v. N. Y. P. & N. R. Co., 241 U. S., 237; 60 L. Ed., 977	27
Beecroft v. G. N. Ry. Co., 134 Minn., 86	30

J 60 25

14, 1928, certiorari denied by the Supreme Court of Illinois on June 21, 1928, sustaining the judgment of the Circuit Court of Cook County for fifteen thousand dollars ($15,000.00) against petitioner and in favor of respondent for personal injuries while working as a switchman, based solely on the Federal Employers' Liability Act (35 Stat., 65).

The first question is whether an imposter (respondent) who, after being rejected for failure to pass the required physical examination on account of bodily defects, secured work as a switchman from a railroad company (petitioner), by impersonating another individual who had passed the physical examination, is an employee of the railroad company within the meaning of the Federal Employers' Liability Act, so as to entitle him to the special benefits of that act, until the fraudulently procured mistake is discovered and the contract rescinded.

Certiorari is here applied for because that question, decided below in favor of the imposter and against petitioner, has never been passed on by this Court, and is of great importance to railroad companies, their employees, and the entire public which uses the railroads.

The Appellate Court of Illinois held that the imposter was entitled to the benefit of the act because, although he insinuated himself into petitioner's train service against its will, by impersonating another individual, still "the relation of master and servant existed" (R., 275, at 282). It quoted with approval the statement that—

> "The contract of employment would not be absolutely void because of the alleged fraudulent statements. The alleged fraudulent statements would only afford grounds for a voidance or annulment of the contract of employment at the option of the company" (R., 281).

The appellate court completely ignored the fundamental distinction between contracts merely voidable for ordinary fraud, and those absolutely void *ab initio* because of a mistake as to the identity of one of the parties. As stated by the Supreme Court of Massachusetts, per Holmes, J., in ***Rodliff vs. Dallinger,* 141** Mass., 1, where one of the contracting parties, through fraud of the other, supposed he was dealing with someone else—

> "There is no question of rescission,—the transaction is void *ab initio,*—and fraud does not impart to it, against the will of the defrauded party, a validity that it would not have if the want was due to innocent mistake."

Or, as stated at 13 C. J., 378:

> "There is no agreement where one party enters into a contract under a mistake as to the identity of the other party, as where the party contracted with has falsely represented himself to be another."

Lord Cairnes applied this principle in ***Cundy vs.*** *Lindsay,* 3 App. Cases, 459, saying:

> "With him they never intended to deal. Their minds never for an instant of time rested upon him, and as between him and them there was no consensus of mind, which could lead to any agreement or contract whatever."

This fundamental principle, that a complete and fraudulently procured mistake as to the identity of one of the contracting parties renders the contract void *ab initio* without any rescission whatsoever, was ignored by the appellate court holding that the alleged contract of employment in this case was not absolutely void but merely subject to rescission, upon discovery of the truth, which was after the accident occurred. Strong reasons of public policy dictate that this principle should not be ignored in a case of this character under the Federal Employers' Liability Act.

Public safety and welfare demand that railroads should be encouraged, not hampered, in their efforts to allow only physically fit individuals to conduct train operations on which the safety of so many human lives depends. The Federal Employers' Liability Act provides special privileges and benefits, over and above those of the common law, in the interest of men in that hazardous service. But the safety of those rightfully so engaged, as well as that of the traveling public, demands that railroads should select such employees with the greatest care. It would place a premium on fraudulent undermining of such service to allow physically disabled persons who surreptitiously insinuate themselves into the same, against the will of the railroad company, to have the special benefits of the act on the same footing as those rightfully engaged therein.

It is not merely a question of permitting an individual who has no right to employment, say as a switchman, to have his damages measured on the false theory that such is his rightful lifework for which he is now disabled, which is only a question of dollars and cents ultimately to be paid by the traveling public. It goes deeper than that, and touches the very lives of the traveling public, by impairing the safety of train service, if this act is construed as conferring its special benefits on undesirables who succeed in evading the regulations excluding them from such service, instead of remitting them to their common law remedies. This Court has not hesitated in other respects to construe this act in the interests of public policy; and we submit the same principle should govern in this connection.

The true name of respondent is Joe Rock (R., 16, 52). He has a brother, John Rock, who lives in North Dakota and works on a farm (R., 16). Respondent made to petitioner his first application for employment on October 1, 1923, under his true name of Joe Rock (R., 16). The rules of the railway company require every applicant for employment in train service to submit to a complete physical examination and to be approved as to physical fitness by the company's medical examiners (R., 182). Respondent underwent this examination and was rejected as physically unfit because he had been previously operated on for appendicitis and abscess of the stomach and had at the time of the examination a rupture (R., 17, 56-57).

It further stated in the same case:

> "Except as specified in paragraph 4 of the act (not here pertinent) the employee assumes the ordinary risks of his employment and, when obvious or fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employees." (Parentheses ours.)

Applying that clear statement to the present case, the undisputed evidence of respondent's own testimony showed that his injury was due to an "ordinary risk of his employment," and that, if it involved any negligence of his employer or fellow employees (which we do not admit), it was "obvious or fully known and appreciated by him."

The map attached to the record (R., opposite p. 78) shows where the accident occurred. It was in the railroad yards at Kolze, Illinois, where trains are made and broken up (R., 2, 3, 5, 6, 21, 34). Here there are main tracks and lead tracks with numerous switch tracks branching therefrom. Respondent was not injured while actually engaged in his work (R., 43). He had left his engine and had gone to supper (R., 22). On his way back to his engine he undertook to cross over the many tracks in the yard (R., 23). He was hurrying as he crossed the tracks (R., 41). He saw the headlight of a locomotive coming from the south pulling a train of about 80 cars (R., 31). It was about 200 feet south of him, and was moving about three miles an hour (R., 23-24, 36-37).

Respondent states that he was blinded by the headlight of this locomotive, but that he kept right on going

(R., 24, 39). He safely crossed the track on which this locomotive and train were approaching without being able to see (R., 39-40). He walked 20 or 25 feet after crossing it (R., 37-38). He then saw a caboose coming down the next track east (R., 24). When he saw the caboose it was about 10 feet from him (R., 25). He had walked onto the track directly in front of this caboose (R., 41) and was struck by it, sustaining the loss of his left leg about 8 inches below the knee (R., 25-27).

The caboose was the foremost of two cabooses which were being shoved north by a locomotive. This movement was one which was made every night in a regular switching movement in making up freights (R., 35, 36). Respondent had crossed the tracks in this locality hundreds of times (R., 29); he had worked as a switchman on the same movement which was being made by the cabooses which struck him (R., 35). Once in a while they had lights on the cabooses and once in a while they did not (R., 35-36). There was no light or man on the cabooses this time (R., 25). Respondent knew that on the old yard lead there might be cabooses backed up without lights; he had seen them so moved before (R., 35-36). Company rules do not require lights on leading cars when moved in yards (R., 182). Respondent's contention that the accident did not occur in the yard limits is untenable, as the map shows (R., opposite p. 78).

Assumption of risk is predicated in this case on the simple proposition that respondent knew when he was blinded by the headlight, as he testified, and volun-

tarily took the risk of what happened to him when he hurried on across the tracks in that condition, without remaining where he was in a position of safety. He knew that the movement of the cabooses on the tracks beyond was a regular movement to be expected about that time (R., 35-36). He knew that sometimes no light was carried on the cabooses as they were pushed along (R., 35-36). This he admitted on cross examination.

The Appellate Court was in error in saying (R., 275, at 283-284) that the jury might find a custom to carry warning lights on the head caboose in such movements, on the basis of a statement to that effect in his direct examination, when it was in effect retracted on his cross-examination. Moreover, since he was blinded, as he testified, he could not have seen a switchman's lantern on the head caboose even if it had been there. Thus we come back to the blinding effect of the headlight as being the proximate cause of the accident, according to plaintiff's testimony, and the inevitable conclusion that he assumed the risk of the known dangers lying beyond when he advanced upon them while thus blinded, instead of remaining where he was. The excuse that he was in a hurry to get back to work is obviously ineffectual.

The Court of Appeals (R., 284) specifically noted that petitioner contended that the risk was assumed. It then proceeded to discuss, not the evidence on that point, but the evidence on which it thought that a finding of negligence might be based against petitioner. It then stated, without any discussion of the

evidence as to assumption of risk, that the jury was correctly instructed on that point and that it was

> "A question of fact—not of law—whether the injury received by plaintiff was occasioned by or through a period of his employment, the risk of which he had assumed" (R., 284).

This we deny, maintaining that this was not a question of fact for the jury because the undisputed evidence makes it impossible for reasonable men to conclude otherwise than that the risk was assumed. In such a state of evidence, the rule of common law is that the jury be not permitted to find that the risk was not assumed, and we submit on the authority of Toledo, St. Louis & Western Railroad Company *vs.* Allen, *supra*, that we are entitled to have this Court consider the record and give us the benefit of the common law rule of which we have been deprived, by reversing the judgment against us.

III.

A third ground for issuance of the writ of certiorari is that the charge of negligence was not established against petitioner by the evidence. Discussion of this will be found in our attached brief.

At the close of plaintiff's case, and again at the close of all the evidence, petitioner moved the trial court to direct a verdict in its favor; which motions were denied (R., 72 77; 255). After verdict for re-

IV.

spondent, petitioner successively moved for a new trial and in arrest of judgment (R., 264-265). These motions were overruled, and an appeal was taken by petitioner to the Appellate Court of Illinois, First District. Errors were duly assigned in that court, upon which it recognized that petitioner had saved, and duly presented, its contentions that respondent was not an employe within the meaning of the Federal Employers Liability Act, that he assumed the risk, and that there was no warrant for finding negligence on the part of petitioner. It specifically considered, and overruled, those contentions in its opinion; and affirmed the judgment. Respondent then made timely application to the Supreme Court of Illinois to review the case on certiorari; which application that court denied. Since it was discretionary with the Supreme Court of Illinois to review the decision of the Appellate Court on certiorari, and the writ was declined, a writ of certiorari from this Court should be addressed to the Appellate Court of Illinois, and the limit of time for making such application here runs from the date when certiorari was refused by the Supreme Court of Illinois, the highest tribunal in that State, on June 21, 1928. American Railway Express Company v. Levee, 263 U. S., 19, 20. Errors urged in this Court are those previously stated, namely, refusal to enter judgment for petitioner on the ground that respondent was not an employe within the meaning of the Federal Employers Liability Act, that he

assumed the risk, and that negligence was not established as against petitioner.

V.

Your petitioner therefore prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Appellate Court of Illinois, First District, and/or to the Supreme Court of the State of Illinois, and the Justices thereof, commanding said court to certify and send to this Court a full and complete transcript of the record and all proceedings of said Appellate Court of Illinois, First District, in this cause entitled John Rock, Appellee, *v.* Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Appellant, No. 31914, on the docket of said Appellate Court of Illinois, First District, to the end that this cause may be reviewed and determined by this Court as in such case is provided by Sec. 237 of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat., 937).

And your petitioner prays that the certified copy of the record and proceedings of the said Appellate Court of Illinois, First District, together, with a certified copy of the record and proceedings had in the Supreme Court of Illinois, all of which is filed as a part of, and as an exhibit to this petition, may be treated as a return to said writ of certiorari, and that the judgment of said Appellate Court of Illinois, First District, in this case and every part thereof be reversed by this Honorable Court, and your petitioner

prays that it may have such other further remedies and relief in the premises as to this Court may seem appropriate and in conformity with the law.

That this is the first application for writ of certiorari to this Court in this cause.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,

By HENRY S. MITCHELL,
JOHN E. PALMER,
Counsel for Petitioner.

JOHN L. McINERNEY,
1521 *Chicago Temple, Chicago, Illinois, of Counsel.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the Appellate Court of Illinois, First District in this cause is found in 247 Ill. App., 600, was filed February 14, 1928, and appears in full in the record (R., 275). The order of the Supreme Court of Illinois made June 21, 1928, denying a petition for writ of certiorari to be addressed to said Appellate Court is not reported, but appears in full in the record (R., 291).

The opinion of the Appellate Court of Illinois, First District, affirming judgment of the Circuit Court of Cook County, Illinois, was filed February 14, 1928 (R., 272), and the order of the Supreme Court of Illinois was made on June 21, 1928, denying the petition for writ of certiorari to be addressed to the Appellate Court of Illinois, First District (R., 291), which petition was duly filed by petitioner May 2, 1928 (R., 275).

The specific claims advanced and rulings made in the lower courts which are relied upon as a basis of this Court's jurisdiction are as follows:

(*a*) The action of the trial court in denying petitioner's motion at the close of plaintiff's case and again at the conclusion of all the evidence to instruct the jury to find defendant not guilty (R., 72-77; 255).

(*b*) The action of the trial court in giving plaintiff's Given Instructions 2 and 3 whereby the jury was in substance instructed that the provisions of the Federal Employers' Liability Act were applicable in this case (R., 256).

(*c*) The action of the trial court in denying petitioner's motion to set aside the verdict and grant a new trial (R., 264-265).

(*d*) The action of the trial court in denying petitioner's motion in arrest of judgment (R., 265).

(*e*) Assignments of error for denial of these motions and said actions of the trial court (R., 266-269).

(*f*) Opinion of the Appellate Court holding that respondent was, at the time of his injury, an employe of petitioner within the meaning of the Federal Employers' Liability Act and particularly in making the following statement wholly unsupported by the record and in fact directly contradicted by the record (R., 9), to-wit:

> "The declaration alleges that the plaintiff was an employe under the provisions of the Federal Employers Liability Act, and the defendant admits that he was" (R., 275).
>
> In this connection see (R., 9).

(*g*) Opinion of the Appellate Court in holding as follows:

> "After a careful consideration of the question, we have reached the conclusion that at the time the plaintiff sustained the injury in question the relation of master and servant existed between him and defendant" (R., 282).

(*h*) The opinion of the Appellate Court in holding as follows:

> "It was a question of fact—not of law—whether the injury received by the plaintiff was occasioned by, or through a peril of his employment, the risk of which he had assumed" (R., 284).

(*c*) The opinion of the Appellate Court in holding that defendant was guilty of negligence proximately causing, or contributing to, respondent's injury (R., 283-284).

Statutory provisions under which this Court's jurisdiction is invoked.

Section 237(*b*) of the Judical Code as amended February 13, 1925. (c. 229, 43 Stat., 937.)

Cases believed to sustain the jurisdiction of this Court.

The action is brought to establish a liability depending solely on acts of Congress.

2d Employers' Liability cases (Mondou *v.* N. Y. etc., R. Co.), 223 U. S., 1.

Seaboard A. L. R. Co. *v.* Horton, 233 U. S., 492.

It therefore involves rights that exist (if at all) exclusively under Federal statutes and, being such, presents Federal questions for determination by this Court. *St. Louis etc., R. Co. v. McWhirter*, 229 U. S., 265.

Chicago, Rock Island & Pacific Railway Co. vs. Bond, 240 U. S., 449, reversing judgment of the Supreme Court of Oklahoma on construction of Federal Employers' Liability Act and particularly in regard to whether a plaintiff was an employe.

Chicago, Milwaukee & St. Paul Railway Company v. Coogan, 271 U. S., 472; writ of certiorari to the Supreme Court of the State of Minnesota granted March 16, 1925, 267 U. S., 589. Decision of this Court, revers-

ing judgment of Supreme Court of Minnesota entered in an action under the Federal Employers' Liability Act.

See also:

New Orleans & Northeastern R. R. Co. v. Harris, 247 U. S., 367; 62 L. Ed., 1167.

St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor, 210 U. S., 281; 52 L. Ed., 1061, 1067.

Seaboard A. L. Ry. Co. v. Duvall, 225 U. S., 477; 56 L. Ed., 1171 (1175).

Chesapeake and Ohio Railway Company v. Nixon, 271 U. S., 218; writ of certiorari to the Supreme Court of the State of Virginia granted April 13, 1925, 267 U. S., 590. Decision of this Court reversing judgment of Supreme Court of Appeals of Virginia which affirmed a recovery of damages in an action under the Federal Employers' Liability Act.

American Railway Express Company v. Levee, 263 U. S., 19, 20, overruling contention that writ of certiorari was addressed to Court of Appeals, First Circuit, of the State of Louisiana and not to the Supreme Court of the State, and holding that when the jurisdiction of the highest court of a State to review a judgment of an intermediate tribunal is discretionary, and review is declined, the writ of certiorari from this Court should be addressed to the intermediate tribunal and that in such case the limit of time for applying to this Court is from the date when the writ of certiorari is refused by the highest court of the State.

Statement of the Case.

Petitioner respectfully refers to the foregoing petition for certiorari; and asks that for the sake of brevity said statement of the case be deemed incorporated in this brief at this point without repetition of the same. For convenience we refer to respondent as plaintiff and petitioner as defendant.

Specification of Assigned Errors Intended to be Urged.

I.

There was error in permitting recovery herein solely upon rights asserted under the Federal Employers' Liability Act; and in holding that plaintiff was an employe of defendant within the meaning of said act; and in holding that the fraud perpetrated upon defendant by plaintiff in seeking employment did not deprive plaintiff of the right to claim the benefits accruing to employes under the provisions of the Federal Act.

II.

There was error on the part of the trial court in denying defendant's motion to direct the jury to find defendant not guilty, which motion was made at the close of all the testimony and upon the ground that plaintiff's injury resulted from dangers incident to his employment and conditions known and appreciated by him and that the risks of such dangers were assumed; and there was error on the part of the Appellate Court in sustaining said rulings of the trial court.

III.

There was error in denying defendant's motion to direct the jury to find defendant not guilty made at the close of all the testimony and upon the ground that there was not sufficient evidence to establish negligence on the part of defendant proximately causing or contributing to, plaintiff's injury; and there was error on the part of the Appellate Court in sustaining said rulings of the trial court.

Summary of Argument.

1.

Page

Plaintiff, under the circumstances disclosed, was not at the time of his injury an employe of defendant within the meaning of the Federal Employers' Liability Act 21-25

1. His fraud vitiated any contract of employment 22
2. The rule of the Railway Company requiring complete physical examination and physical fitness for the important and dangerous work of railroad switchman is a reasonable and salutary one 23
3. The Federal Employers Liability Act grants special rights and advantages enjoyed by none other than railway employes, and a valid contract of employment is necessary 24
4. Plaintiff was a trespasser, or at most a licensee, to whom defendant stood in no contractual relation 24

II.

Plaintiff's injury resulted from dangers incident to his employment and from conditions well known and appreciated by him, and the risks arising from such dangers were assumed 25-28
1. The accident occurred in a railroad yard where trains were made and broken up and plaintiff assumed risk of switching movement without signals or lookout 25
2. Plaintiff was thoroughly familiar with all the physical conditions and must be held to have appreciated the risks involved 27

III.

Claim of negligence of defendant proximately causing or contributing to plaintiff's injury was not established by substantial evidence as required by the decisions of this Court 28-30
1. There was no negligence with respect to bright headlight and the switching movement without signal or lookout was not negligence in this railroad yard 29
2. The negligence claimed was not shown to be the proximate cause of plaintiff's injury 29

ARGUMENT.

I.

There was error in permitting recovery herein under the Federal Employers' Liability Act; and in holding that plaintiff was an employe of the defendant within the meaning of said act; and in holding respondent entitled to the benefits of said act.

This case presents an extraordinary situation. It is brought under the Federal Employers' Liability Act. It is instituted and prosecuted to judgment in the name of John Rock, a man never employed by defendant, who never was injured, and who was working on a farm in North Dakota at the time of the employment, the injury and the trial. The employment was by gross fraud obtained by one Joe Rock, masquerading as his brother John. Defendant by special plea denied that plaintiff was ever its employe (R., 8-9). The plaintiff in the action therefore had the burden of establishing a valid contract of employment; that he was injured while employed in interstate commerce; that his injury was proximately due to the negligence of defendant; and that he did not assume the risks involved.

We briefly advert to the proof of employment given by Joe Rock and respecting which there is no dispute. Joe Rock testifies that his true name is Joe Rock (R., 16); that he made to defendant an application for employment as a switchman October 1, 1923, under his true name (R.,16); that he was rejected because in 1912 he had an operation for abscesses of the stomach and in 1917 had his appendix removed and had at the time of the examination a rupture (R., 17); that he was physically examined by the railway doctors Thompson and Mullen, who put him through the "sprouts," and he told them all about himself (R., 43); that they rejected him because he was not competent to take a job as switchman (R., 43); that these doctors told him he had a rupture and could not pass

(R., 57); that 18 days later, on October 18, 1923, he made to defendant another application for employment, but not in his own handwriting (R., 17); that he made it under the name of his brother, John Rock, who was then and at the time of the trial working on a farm in North Dakota (R., 16); that he knew he would be rejected if he had another examination (R., 44); that he therefore had another fellow go down for him (R., 18); that this fellow got examined by the doctors (R., 18), that he (Joe Rock) then went to work (R., 18); that the fellow who did take the physical examination under the second application was Adam Lenhart (R., 45); that he (Joe Rock) got Lenhart as a substitute because he knew there would have to be another physical examination (R., 54); that when he made the second application the Superintendent said, "Wasn't you here before?" and he (Joe Rock) answered, "No, my brother was here" (R., 56, 57); that the Superintendent then gave him a slip to the doctors in the name of John Rock (R., 56); that he then got Lenhart and took Lenhart with him to the doctors' office (R., 57); that he (Joe Rock) sat in the waiting room and Lenhart went up to the doctors and said, "I am John J. Rock," and was examined and passed (R. 57-58).

This Court will take judicial notice of the importance of railway rules requiring complete physical examination of applicants for the important and dangerous work of railway switchmen; and that it involves questions of public policy of far-reaching importance. There is to be considered not alone the safety and lives of such employes themselves, but the safety and lives

of other employes, the traveling public, the safety of railway property, and the safety of persons and property generally, as at railway crossings, etc. The regulation is a reasonable and salutary one, and, as is said in *Norfolk & Western Railway v. Bondurant*, 107 Va., 515; 15 L. R. A. (N. S.), 443:

> "It would be a hard measure of justice to hold a company responsible on the one hand for failure to prescribe rules and on the other to refuse to protect it from the consequences of the violation of reasonable and proper rules adopted and promulgated in the discharge of the duty imposed by law."

There Federal Act grants to railway employes rights which never obtained at common law and rights and advantages enjoyed by none other than such employes. It is respectfully submitted that to be an employee under the act there must be a valid contract of employment; and that one may not obtain by flagrant fraud the special rights and advantages granted by the act. Joe Rock was not an employe within the meaning of the act; but for his fraud he would never have been in this railway yard. He was therefore a trespasser, or at most a bare licensee, to whom the Railway Company stood in no contractual relation and owed no duty based on the existence of such relation. The fact that the physical defects which caused

this man's rejection did not cause his injury is not controlling. The following cases are directly in point:

Stafford *v.* B. & O. R. Co., 262 Fed., 807.

Norfolk & Western Ry. Co. *v.* Bondurant, 107 Va., 515; 15 L. R. A. (N. S.), 443.

Fitsmaurice *v.* N. Y., N. H. & H. R. Co., 192 Mass., 159; 6 L. R. A. (N. S.), 1146.

Morgan Munitions Co. *v.* Studebaker Corp., 226 N. Y., 94.

Mexican Amole Soap Co. *v.* Clarke, 72 Ill. App., 655.

II.

Plaintiff's injury resulted from dangers incident to his employment; and from conditions well known and appreciated by him; and the risks arising from such dangers were therefore assumed.

That this accident occurred in a railroad yard is beyond question. It is expressly so alleged in every one of the four counts in the declaration (R., 2, 3, 5, 6); it is established by the testimony of the plaintiff himself (R., 21, 34); also by the map (R., opposite p. 78), and it is nowhere disputed. Plaintiff states at R., 34, "It was a railroad yard." The Belt Line train on the new yard lead was coming into the yard on its regular time as plaintiff knew (R., 35); the cabooses which were being shoved north on the old yard lead were got every night from the caboose storage track east of the depot, brought in over Irving Park Boulevard on this same track and kicked in on the switching tracks to be used in making up freight trains (R., 35). Plaintiff had worked in this yard 13 months and was thoroughly

familiar with it; he had been on duty both night and day; he knew all about the nightly movement of these cabooses; he had worked on that job himself (R., 35-36); once in a while they had lights on the cabooses and once in a while they did not (R., 35-36); he knew that on the old yard lead (the one he went upon after passing in front of the Belt Line train) there might be cabooses backed up without light or man on them (R., 35-36); he had seen that before (R., 36). Plaintiff testifies to no knowledge of any custom to have a light or man on the foremost caboose, nor does he testify to reliance on any such custom. He testifies to no knowledge of any custom of this caboose train to give signals by whistle or bell nor does he testify to reliance on any such custom. The rule of the railway company is as follows (R., 182):

> "When cars are pushed by an engine *except when shifting and making up trains in yards*, a flagman must take a conspicuous position on the front of the leading car."

It is undisputed that the movement in question was that of shifting and making up trains in the yard. There is no rule or regulation of the railway requiring the blowing of the whistle or the ringing of the bell in such movements; nor was there any testimony of a custom to give such signals. It is submitted that the risks of such movements in this yard must be held to have been assumed by plaintiff.

Toledo, St. Louis & Western v. Allen, 48 S. C. R., 215; 72 L. Ed., 267.

Boldt *v.* Penn. R. R. Co., 245 U. S., 441, 445; 62 L. Ed., 120.

Pryor *v.* Williams, 254 U. S, 43; 65 L. Ed., 120.

Chesapeake & Ohio *v.* Nixon, 271 U. S., 218.

Jacobs *v.* Southern R. Co., 241 U. S., 229; 60 L. Ed., 970.

Baugham *v.* N. Y. P. & N. R. Co., 241 U. S., 237; 60 L. Ed., 977.

Seaboard A. L R. R. Co. *v.* Horton, 233 U. S., 492; 58 L. Ed., 1062.

Gilmer *v.* Yazoo & M. V. R. R. Co., 4 Fed. (2d), 963; certiorari denied, 268 U. S., 705; 69 L. Ed., 1167.

Davis *v.* Phila. & R. Ry. Co., 276 Fed., 187.

Connelley *v.* Penn. R. Co., 228 Fed., 322.

Ross *v.* C., R. I. & P. Ry. Co., 243 Ill., 440.

C. & N. W. Ry. Co. *v.* Donahue, 75 Ill., 106.

As to the glare of the headlight on the locomotive of the Belt Line train, it is submitted that such condition was clearly assumed; likewise the resulting inability to see whether cars were being moved on the next track, the old yard lead. Plaintiff testifies that he had faced such headlights time and time again (R., 39); that he knew all about the effects of so facing them (R., 39, 40, 42); that because of this headlight at the time in question he could not see whether there was anything on the old yard lead or whether it was clear; in fact he couldn't see anything (R., 40).

> "Q. Whatever happened, you couldn't see anything coming up or down the old lead?
> "A. No.

"Q. And you walked across without being able to see, is that right?

"A. Yes sir (R., 40).

"Q. How far down did you walk after you crossed the track (new yard lead), before you were struck?

"A. I walked about—about 25—about 20 or 25 or 20 feet, something like that" (R., 37-38).

It is submitted that thus knowing fully all the material conditions, plaintiff assumed the risks thereof. *Jacobs v. Southern R. Co.*, 241 U. S., 229; 60 L. Ed., 970. The Illinois Appellate Court appears to hold that negligence may be found in failure to have a man or light on the advancing end of the first caboose; but in view of the admitted fact that plaintiff would not have seen either, such failure cannot be held any part of the proximate cause of the accident. Plaintiff does not testify that he relied on any such thing, neither does he testify that he paid any attention to whether signals were given by the locomotive pushing the cabooses. In view of the fact that it was some 20 feet to the old lead track; that the Belt Line train was between him and the caboose train, that there were two cabooses and the tender ahead of the locomotive, that plaintiff was moving rapidly and without attention; it is obvious that any signals given by the locomotive of the caboose train would not have been useful to plaintiff. *Toledo, St. Louis & Western v. Allen*, 48 S. C. R., 215, 72 L. Ed., 267.

III.

The claim of negligence on the part of defendant proximately causing or contributing to the injury does

not find substantial support in the evidence as is required by the decisions of this Court.

The Appellate Court of Illinois does not find negligence in having a bright headlight on the locomotive of the Belt Line train. That is obviously right for in no aspect of the case can the condition of that headlight be said to be negligence as to plaintiff. He was not put to work in the glare of that headlight; he had no concern with the movement of either the Belt Line train or the switching of the caboose (R., 43). But the glare of the Belt Line headlight, and nothing else, was the cause of plaintiff not seeing the moving cabooses on the old yard lead. It would seem conclusive that plaintiff's major premise as to defendant's negligence is wholly unestablished.

But the Illinois Appellate Court held that a finding of negligence might be based on failure to have a man or light on the foremost caboose and on the failure to signal the "kick in" movement. We think we have already shown that neither of these failures (even if negligence), can be held the proximate cause of the accident. We think we have sufficiently shown also that the risks of such movements without signal or lookout, were assumed by plaintiff. Plaintiff's own testimony negatives any uniform custom to have either man or light on these cabooses in this switching movement (R., 35-36); and, as we have shown, no rule requires it. Neither is there any proof of rule or custom requiring signals by whistle or bell. Neither is there any showing that either lookout or signal would have prevented this accident.

The Illinois Court's holding of negligence in respect to the failure to give signals or have a man or light on cars in a switching movement such as this was, is contrary to the rule established by this Court and the lower Federal Courts, as well as by numerous State courts. We cite but a few of the multitude of cases on this point:

Toledo, St. L. & W. *v.* Allen, 48 S. C. R., 215; 72 L. Ed., 267.

Aerkfetz *v.* Humphreys, 145 U. S., 418; 36 L. Ed., 758.

Rosney *v.* Erie R. Co., 135 Fed., 311, 315.

Connelley *v.* Penn. R. Co., 201 Fed., 54, 57.

Beecroft *v.* G. N. Ry. Co., 134 Minn., 86.

Neidlein *v.* So. Pac. Ry. Co., 180 Cal., 63.

Hinson *v.* Atlanta & C. A. L. Ry. Co., 172 N. C., 646

Olson *v.* C., R. I. & P. Ry. Co., 162 Minn., 194.

Lancaster *v.* St. L. & S. F. R. Co., 128 Okla., 176.

It is therefore respectfully submitted that a writ of certiorari should be granted.

HENRY S. MITCHELL,
JOHN E. PALMER,
Counsel for Defendant and Petitioner.

JOHN L. McINERNEY,
Of Counsel.

1521 Chicago Temple Bldg., Chicago, Ill.

Office Supreme Court, U. S.
FILED
OCT 26 1928
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 454

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

JOHN ROCK, RESPONDENT.

REPLY BRIEF OF PETITIONER.

Application to the appellate court for a certificate of importance in a case of this character would have been a useless formality. In an analogous case under the Federal Employers' Liability Act, Kenna *vs.* Calumet Railway, 206 Ill. App. Ct. Repts., 17, at 44, that court denied a certificate of importance on the ground that the application to the Supreme Court of Illinois for certiorari was the correct procedure. This negatives the idea that both applications should be made. The court there said:

> "This method of review was provided primarily for cases not otherwise reviewable, and while there are exceptions to the general rule,

> we see no reason why the appellant in the instant case should not make its application to the Supreme Court for a writ of certiorari."

There is no warrant for assuming that an exception to the above rule would be made in our case, since it is essentially analogous to the above case in which the rule was enforced. Moreover the Illinois Supreme Court declared, in Soden *vs.* Claney, 269 Ill., 98, that, whereas its denial of certiorari does not necessarily mean an approval of the reasons on which the appellate court based its judgment, still "it is an approval of the conclusion reached and is therefore in effect an affirmance of the judgment."

Thus the denial of certiorari in our case by the Supreme Court of Illinois was, in effect, a final judgment by the highest court of the State, and since the record is in that court, this Court has jurisdiction to issue a writ of certiorari to that court.

HENRY S. MITCHELL AND
JOHN E. PALMER,
1427 *First Nat'l Soo Bldg.*,
Minneapolis, Minn.,
Counsel for Petitioner.

JOHN L. McINERNEY,
1521 *Chicago Temple Bldg.*,
Chicago, Ill.,
Of Counsel.

(4000)

INDEX.

Subject Index.

	Page
Statement of case	1
Assigned errors intended to be urged	9
Argument	10
I. Plaintiff not entitled to benefits of Federal act	10
II. Evidence insufficient for finding defendant negligent	27
III. Assumption of risk established as a matter of law	38

Table of Cases.

American Security Co. vs. District of Columbia, 224 U. S., 491	26
Aerkfetz vs. Humphreys, 145 U. S., 418	30, 32, 35, 40
American Surety Co. vs. Pauly, 170 U. S., 133	14
Anson, Contracts, 3d American Edition, page 207	18
Arkansas Smelting Co. vs. Belden Co., 127 U. S., 379, 387	18
Carlo vs. B. & L. E. R. Co., 143 Atl., 5	33
C. & A. Ry. Co. vs. Wagner, 239 U. S., 452	17
C., M. & St. P. Ry. vs. Coogan, 271 U. S., 472	27
C., B. & Q. R. Co. vs. Hammond, 210 Ill., 187	14
Cundy vs. Lindsay, 3 Appeal Cases, 459	18
39 Corpus Juris, 721	41
13 Corpus Juris, 378	17
Davis, Agent, vs. Kennedy, 266 U. S., 147	22
Fletcher, Corporations, Vol. IV, page 3457	14
G. N. Ry. Co. vs. Wiles, 240 U. S., 444	22
Holy Trinity Church vs. U. S., 143 U. S., 457	25
Horner vs. Graves, 7 Bing., 735	22
Hull vs. P. & R. Ry. Co., 252 U. S., 475	20
I. C. Ry. Co. vs. Hart, 176 Fed., 245	34
I. C. Ry. Co. vs. Skaggs, 240 U. S., 66	22
National Life Insurance Co. vs. Minch, 53 N. Y., 144	14
N. & W. Ry. Co. vs. Bondurant, 107 Va., 515	20
N. & W. Ry. Co. vs. Gesswine, 144 Fed., 56	33
Payne vs. Daugherty, 283 Fed., 353	61
P., B. & W. R. Co. vs. Schubert, 224 U. S., 603	17
Rodliff vs. Dallinger, 141 Mass., 1	17
Robinson vs. B. & O. R. R. Co., 237 U. S., 84	20

	Page
10 Ruling Case Law, p. 1005	28
20 Ruling Case Law, p. 47	33
Second Employers' Liability Case, 223 U. S., 1	24
S. & I. Ry. Co. vs. Campbell, 241 U. S., 497	17
Stafford vs. B. & O. Ry. Co., 262 Fed., 807	21
Toledo, St. Louis & Western R. Co. vs. Allen, 276 U. S., 165	31, 35, 38, 42, 43
U. V. Ry. Co. vs. Cahline, 49 S. C. R., 91	22
Yazoo & M. V. R. Co. vs. Kern, 90 Ark., 584	13

OFFICIAL REPORT OF OPINIONS BELOW.

Opinion of Appellate Court of Illinois	247 Ill. App., 600
Order of Supreme Court of Illinois	Not reported, but appears in full in the record. (R., 291.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 454

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

JOHN ROCK, RESPONDENT

ON CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND/OR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR PETITIONER.

Statement of Case.

This case is here on certiorari to review a judgment of the Appellate Court (on which certiorari was refused by the Supreme Court of Illinois), affirming a judgment of the Circuit Court of Cook County, for

$15,000 in favor of respondent (hereafter called plaintiff) and against petitioner (hereafter called defendant) in a suit under the Federal Employers Liability Act (35 Stat. 65) for injuries sustained by ~~defendant~~, a switchman, in the course of interstate commerce, in defendant's switching yard at Kolze, Illinois.

The questions on which this Court is asked to pass are: first, whether an impostor is entitled to the benefits of the Federal Employers' Liability Act; second, whether evidence of defendant's negligence was sufficient as a matter of law; third, whether plaintiff's assumption of risk was established as a matter of law.

Plaintiff was a man whom defendant refused knowingly to employ in train service on account of physical defects disqualifying him for that occupation. On October 1, 1923, he applied, under his true name of Joe Rock to defendant's yardmaster at Kolze, Illinois, for work as a switchman in that yard. (R. 16, 17, 53.)

The yardmaster does not hire employes, but merely sends applicants to the superintendent's office. (R. 91.) He sent plaintiff to the superintendent's office. (R. 55.) The latter, in connection with the company doctor, is the employing officer. (R. 162.)

The superintendent followed the regular practice in dealing with plaintiff's application. (R. 163.) This consisted in having the candidate fill out an application stating his previous record, giving him a slight oral examination, and if he looked all right, sending him to a company doctor for physical examination. If passed by the company doctor, the candidate would be put on the roster. (R. 162.) If unable to pass, he

would be rejected by the company doctor. (R. 57.) This, without any further appearance before, or communication with, the superintendent, would entitle the applicant to go to work. One of defendant's standing general rules requires that employes pass the required examinations. (R. 182.)

When plaintiff was sent by the superintendent to the company doctors for physical examination they found that he had previously been operated on for an abscess, or ulcer, of the stomach and for appendicitis and that he then had a rupture or hernia. (R. 17, 43, 57.) Plaintiff was then and there informed by one of the doctors that he was rejected on account of his physical defects. (R. 43, 57.)

Plaintiff later procured the desired employment by practicing the following fraudulent imposture and false impersonation. On October 18, 1923, he again applied to the yardmaster at Kolze for a position, this time under the alias of John Rock. (R. 17.) He thus procured himself to be sent a second time to the superintendent's office. (R. 55.) There he was asked if he had not been there before. (R. 56.) He replied "My brother was here." (R. 56.) Having thus allayed suspicion, and being sent again to the company doctor's office for examination, he took another man named Lenhart to the doctor's office, to pass the physical examination in the name of John Rock. (R. 18, 56, 57.) Plaintiff remained outside in the waiting room while Lenhart went to the doctor's, said "I am John J. Rock," and successfully passed the examination. (R. 57, 58.) The name John J. Rock was thereupon put

on the roster of employes, and plaintiff went to work as a switchman's helper in defendant's yard at Kolze. (R. 18, 19, 56.)

While it is far from clear, it is possible, that plaintiff meant to claim in his testimony, in which he spoke of giving some cigars to the yardmaster, that the latter recalled plaintiff's previous application and rejection when plaintiff made his second application and was put to work. (R. 55.) This the yardmaster denied. (R. 84.) With this possible exception of the yardmaster, who had no authority to represent defendant in the matter of employment, there is no suggestion that any representative of defendant had any knowledge of plaintiff's imposture until after the accident for which this suit was brought.

The accident occurred after plaintiff had been working for defendant approximately fourteen months, at about 9:00 o'clock in the evening of December 31, 1924. (R. 18, 20, 21.) The Kolze yard where plaintiff worked runs north and south, and the southern end, where the accident happened, is shown in a map opposite (R. 78.). Plaintiff had been switching and making up trains in the north end of the yard, and came with his crew to the south end at about 8:30 or 9:00 o'clock in the evening. (R. 21.) He left his engine on the easternmost tracks, east of the depot. (R. 21.) His work involved interstate commerce. (R. 21.) The crew then had twenty minutes for their supper. (R. 22.) The others ate in the depot nearby, or in the engine. (R. 22.)

Plaintiff went to his mother-in-law's for supper. (R. 22.) This was across the tracks on the west, or oppo-

site, side from where he left his engine, about 300 feet distant from the tracks. (R. 22.) He was at his mother-in-law's house between ten and fifteen minutes. (R. 22.) On his way back to his engine, after supper, he stopped at the oil house on the west side of the tracks, before crossing them, to fill his lantern. (R. 22, 23.)

Plaintiff then had to cross five or six tracks to get back to his engine. He crossed the first, or ice-house track, without adventure. (R. 23.) He then saw on the next track—the new yard lead track—a long train approaching from the south at a rate of about three miles per hour. (R. 23, 24, 31.) Plaintiff testified that it had a bright headlight. (R. 23.) He crossed the track in front of this train. (R. 24.) At first he testified that he was walking slowly. (R. 37.) Later, he admitted that he was in a hurry to get back to his job, afraid he would be late, and that he was walking fast, going faster than the engine. (R. 40, 41.) He was running, according to the testimony of a brakeman riding on the front of the engine, who saw him plainly until he was struck and run over on the next track. (R. 241.)

Plaintiff testified that the next track was about fifteen feet distant from the one he had just crossed. (R. 24.) The original map which was put in evidence as defendant's Exhibit #1 (shown on a reduced scale opposite R. 78) and which was based on an actual survey proves that the distance between these two tracks, center to center, was nineteen feet. (R. 77.)

Asked what happened next plaintiff answered: "Well, I kept right on going. And the next thing I

knew, why, I seen a caboose • • • coming down the old lead (the next track) • • • come out from under that bright headlight • • • moving north. • • • I tried to get out of its way • • • it struck me and knocked me down." (R. 24, 25.)

The engine which was pushing these cabooses was a switch engine. (R. 120.) The engineer, the switch foreman or conductor, and plaintiff himself, who had previously worked on this movement, described it. It consisted in getting two cabooses which were stored on a track on the east side of the depot, hauling them south across Irving Park Boulevard, then backing them north over that boulevard along the track on the west side of the yard on which they were moving when plaintiff was injured, and from there "kicking" them in "to be used on the freights." (R. 35, 121, 123, 206, 207.)

The last stop of the cabooses previous to the movement in which plaintiff was injured was made with the head caboose at No. 1 switch, headed north. (R. 131.) See map. (R. 78.) The conductor in charge of the movement then went ahead to throw the next switch—No. 2—and stood there. (R. 207.) He was then about seventy-five feet ahead—north—of the head caboose. (R. 207.) Thus he had a clear view of the track along which it was to be kicked towards him. He then gave the signal to cut the cabooses off and kick them ahead. (R. 208.)

The engineer then started up, and had advanced about fifteen feet, and was just about to increase his speed preparatory to the kick—going about six miles

per hour—when the conductor who was still standing at No. 2 switch saw plaintiff dart across in front of the engine of the Belt Line train towards the tracks on which the cabooses were being shoved. The Belt Line train was approaching on a parallel track in the same direction as the cabooses were coming. (R. 124, 208, 210.)

The conductor gave a violent signal to stop the caboose movement; the switchman who was to cut off the cabooses refrained from doing so; the engineer applied the emergency brake and "put the sand on"; and he stopped within thirty or thirty-five feet after striking plaintiff. (R. 124, 210, 215.)

Negligence was asserted against defendant, in the complaint or declaration, on the alleged ground that it operated the Belt Line engine (by which plaintiff testified that he was blinded when he looked in the direction of the approaching cabooses) within yard limits without dimming its headlight. (R. 4, 6, 7.) The only evidence which in any way tended to support this charge was that of plaintiff, who merely asserted that the headlight was "bright"; that it "blinded" him; and that a dimmed headlight would not blind the vision. (R. 23, 31.) He did not directly assert that the headlight was not dimmed. Of the nine witnesses who were actually at or near the scene of the accident and testified for defendant, seven, including the engineer who had dimmed it, on reaching the yard limits, directly testified that the headlight was dimmed, and two that they had not noticed. (R. 111, 124, 142, 168, 185, 197, 207, 227, 238.)

It is admitted that no whistle or bell or other audible signal was sounded to warn of the caboose movement; but there was no evidence that such was customary or required.

Alleged negligence of defendant was also based on the admitted fact that there was no lookout man or warning light on the caboose which ran over plaintiff. As noted above, it was being pushed about in the switching yard. (R. 206, 208.) When cars are being pushed by an engine, defendant's rules require a flagman to be in a conspicuous position, and a white light to be displayed at night on the front of the leading car—"except when shifting or making up trains in yards". (R. 182.)

To offset this, an attempt was made to prove a custom to have a man with a light on the foremost car in performing this particular movement. Plaintiff produced one witness who testified that he had never seen the movement performed otherwise. (R. 71.) The testimony of all the other witnesses was to the effect that this was only done when an immediate coupling was to be made; that otherwise the lookout would be there while passing over the public street or Irving Park Boulevard, after which he would drop off, before reaching the point where this accident occurred. (R. 65, 124, 210.) There was no testimony that a man would remain on the head caboose with a light for the purpose of warning yard employes of the movement. Plaintiff himself negatived the alleged custom by testifying that he had worked on this very movement many times and that "once in a while" they had such a light

and "once in a while" not. (R. 36.) Also that he knew that cabooses might be backing up on this track without a light. (R. 36.)

There was some attempt, in behalf of plaintiff, to establish that there was a well defined path across the tracks at the place where he was injured. No evidence was elicited to establish such a path. It was shown, however, that yard men frequently crossed the track back and forth in this general vicinity.

Assigned Errors Intended to be Urged.

In the Circuit Court defendant filed a plea denying the relationship of employer and employe between it and plaintiff (R. 9); requested an instruction to the jury in which the same point was involved, which was refused (R. 264); moved for a directed verdict in its favor at the close of plaintiff's case and again at the close of all the evidence, which motions were denied (R. 72-77, 255), and moved for a new trial and in arrest of judgment, which motions were refused. (R. 264-265.) Defendant appealed to the Appellate Court, which affirmed the judgment of the Court below, and in its written opinion (R. 275-276) recognized that defendant had duly saved the grounds of error hereinafter urged, namely:

1. That plaintiff was not entitled to the benefits of the Federal Employers' Liability Act.

2. That the evidence was not sufficient for finding defendant negligent.

3. That plaintiff's assumption of risk was established as a matter of law.

Error in Holding Plaintiff Entitled to the Benefit of the Federal Employers' Liability Act.

Plaintiff was an impostor who slipped into defendant's train service operations by false impersonation. He had applied to defendant for such employment in his true personality and under his true name, Joe Rock; had attempted to pass the requisite physical examination; and had been rejected because of previous stomach ulcers or abscess, an operation for appendicitis, and hernia or rupture then existing. (R. 17, 43, 57.) These physical defects disqualified him according to defendant's established rules for such service, and he was so advised by the examining physician. (R. 43, 57.)

Later, he secured such employment by assuming a false personality. He gave the superintendent, who was the employing officer, a different name than he had given the first time, John J. Rock. When the superintendent asked if he had not been there before he replied, "My brother was here". (R. 56.) Thus he falsely represented himself as not being the same person who had applied before and been rejected. Then he procured another man to go to the company doctor's office, say "I am John J. Rock," and successfully pass the physical examination. (R. 57, 58.) Plaintiff assumed to himself the physical personality of this other man in going to work under the certificate of fitness thus procured and issued. (R. 18, 19, 56.)

In this way plaintiff fraudulently brought about a complete mistake on the part of defendant's superintendent and physician, who were its only authorized representatives in the matter of this employment, as to those aspects of his personality which were material to the defendant in connection with such employment; and defendant had no intention whatever of contracting with him for his employment in his true personality.

Of course, when plaintiff worked for defendant he became its employe in a *de facto* sense. But it is our contention that because of the fraudulent imposture and false impersonation by which he secured such employment he never was our employe *de jure*. Hence we contend that his rights are only such as he may have at common law; and that he is not entitled to the special benefits of the Federal Employers' Liability Act, on which this suit was based.

The Appellate Court's opinion erroneously stated that defendant admitted "that plaintiff was an employe under the provisions of the Federal Employers' Liability Act". (R. 275.)

Defendant had filed a plea specifically denying the relationship of employer and employe (R. 9); requested an instruction to the jury in which the same point was involved, which was refused (R. 264); moved for a new trial, after verdict, which was refused (R. 265), and assigned error in the Appellate Court in which the point was saved. (R. 269.) Indeed, the Appellate Court itself, later in its opinion, considered the point as being before it, saying that defendant contended that,

> "The fraud perpetrated upon the defendant by the plaintiff in his attempt to secure employment deprived him of the right to claim the benefits accruing to employes under the provisions of the Federal Employers' Act." (R. 278.)

The Appellate Court held that the misnomer of plaintiff in his declaration or complaint was not available to defendant for lack of a plea in abatement, and was without merit. With that ruling we have no quarrel. It is of no real importance to us under what name plaintiff brought his action. Nor would the mere fact that he gave a false name in seeking employment be vitally important in and of itself. It is only material to us in so far as the false name of John J. Rock was used as a means of divorcing himself, in the employing officers' minds, from the Joe Rock who had previously applied, and whom they were unwilling to employ on account of physical disability. That is the real significance, as we see it, of the change of names.

The Appellate Court declared, as if it eliminated defendant's right to insist on its mistake as to plaintiff's personality, that,

> "The testimony of the plaintiff is to the effect that when he made the second application the yardmaster knew that he was the same person who had been rejected under the first application." (R. 276.)

The yardmaster had no authority to hire men. (R. 91.) He was merely the man by whom plaintiff was sent to the superintendent, who was the employing

officer. (R. 91, 162.) His testimony denied any recollection of a previous application and rejection of plaintiff. (R. 84.) Indeed, plaintiff's own testimony on the point (R. 55) is far from clear, as indicated by the fact that his counsel in his reply brief opposing the issuance of certiorari in this Court merely stated that "it may reasonably be inferred" from plaintiff's testimony that defendant's yardmaster had such recollection and knowledge. (Reply 4.) But even if we indulge that doubtful inference, as did the Appellate Court, it does not dispose of the defendant's right to rely on its fraudulently procured mistake as to plaintiff's personality.

For, as we have seen, the yardmaster was not the employing officer. As was said in Yazoo & M. V. R. Co. *vs.* Kern, 99 Ark. 584, 138 S. W., 988, 989:

> "The position of yardmaster with respect to the employment of men under his control is the same as that of conductor of a train. His crew is made up for him by another who is superior in authority and who employs the men to work under him. * * *
>
> "The company had the right to determine, through its officers, what persons should be taken into its service and what particular agent should be clothed with authority to enter into contracts for service to be performed."

Being without authority in the matter of employment, knowledge of the yardmaster uncommunicated to those representatives of the defendant who were authorized to make the contract of employment, would not bind the defendant, without proof that it was

within the scope of his duty to impart the information to the corporation. Fletcher Cyc. of Corporations, Vol. IV, page 3457; C., B. & Q. R. R. Co. *vs.* Hammond, 210 Ill. 187, 71 N. E. 576. There was no such proof in the record.

Moreover, if the suggested inference is to be drawn from plaintiff's testimony, then it plainly shows collusion with plaintiff by the yardmaster against defendant's interests, in sending plaintiff to the superintendent a second time for employment, knowing that he had been rejected as ineligible. Such collusion would, on the plainest principles of justice, prevent defendant from being bound by the yardmaster's knowledge. As this Court stated in American Surety Co. *vs.* Pauly, 170 U. S. 133, 156:

> "The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal."

Or, as stated by the New York Court of Appeals in National Life Insurance Co. *vs.* Minch, 53 N. Y. 144, 150:

> "If a person colludes with an agent to cheat the principal, the latter is not responsible for the acts or knowledge of the agent. The rule which charges the principal with what the agent knows is for the protection of innocent third

> persons, and not those who use the agent to further their own frauds upon the principal."

The Appellate Court also pointed out, as if it tended to dispose of the contention that plaintiff was not an employe within the meaning of the Federal Employers' Liability Act, that:

> "The physical condition of the plaintiff at the time of the accident did not contribute in any way to his injury." (R. 278.)

This point has also been repeatedly emphasized by counsel for plaintiff. We are utterly unable to see that it has any bearing whatever on this question. Plaintiff attempts to secure the benefits of the Act on the theory that he is an employe within its meaning. We contend that he is not such an employe because of the mistake which he fraudulently procured as to his personality. The question turns entirely upon the fraudulent manner in which he procured his employment. If we are right he never became our employe in a proper sense regardless of what was the cause of his injury. Indeed, the validity of our contention in this regard would be the same if he had never received any injury whatsoever.

The Appellate Court also indicated in its opinion that it felt constrained to rule against us on this point by the authority of previous decisions which were cited in the opinion. (R. 280-282.) These were cases in which men seeking employment misrepresented their age or physical condition. This, according to the decisions, rendered the contract of employment merely

voidable upon the discovery of the fraud, and not absolutely void *ab initio*. A distinction which we emphasize is that in all these cases the employe presented himself throughout in his proper person, and there was no false impersonation of another individual resulting on the part of the employer in a mistake as to the personality of the man employed.

Moreover, only one of these cases was a decision by a Federal court, Payne *vs.* Daugherty, 283 Fed. 353, decided by the Circuit Court of Appeals, Eighth Circuit, in October, 1922. Further, that was the most extreme of the cases cited, so that in dealing with it we will at the same time be dealing with the other cases cited. There a switchman was injured, as alleged, through a defective handhold in the ladder of a car moving in interstate commerce. When he brought suit against the Director General, the latter offered to prove that plaintiff obtained his position by fraudulently misrepresenting his former employment and concealing prior injuries, and that he was a victim of epilepsy. It appeared that he had signed a written statement, when seeking employment, which in effect concealed the above matters; but it did not appear that he had assumed a false personality. (283 Fed. 358.)

In that case the Court of Appeals sustained the trial Court's exclusion of the offered evidence on the ground that it should not permit

> "a retroactive dissolution of the relation of master and servant, by virtue of the contract, which, even if voidable, was, while it subsisted, attended with the duty required by law for the safety of the latter (plaintiff). * * * In our

> opinion we should hold that the defense urged was not available in view of the positive terms of Sections 1 and 5 of the former Act."

Immediately following the statement last quoted above the Court of Appeals cited three decisions of this Court: P. B. & W. R. R. Co. *vs.* Schubert, 224 U. S. 603; C. & A. Ry. Co. *vs.* Wagner, 239 U. S. 452; S. & I. Ry. Co. *vs.* Campbell, 241 U. S. 497. We have examined these cases, and do not find that they involve the ruling in support of which they are cited. The decision of the Court of Appeals in that case did not reach this Court, and its soundness appears to us questionable on grounds of public policy hereinafter mentioned. However that may be, that case merely involved fraudulent misrepresentations, without any false substitution of another personality, whereas our case presents such a substitution resulting in a mistake as to the essential identity of one of the contracting parties, which, unlike mere fraud which renders a contract only voidable, is recognized as rendering it absolutely void *ab initio*.

The rule is thus stated at 13 *C. J.* 378:

> "There is no agreement where one party enters into the contract under a mistake as to the identity of the other party, as where the party contracted with has falsely represented himself to be another."

Again, the Supreme Court of Massachusetts, per Holmes, J., in Rodliff *vs.* Dallinger, 141 Mass. 1, where one of the contracting parties, through fraud of the

other, supposed he was dealing with someone else, held:

> "There is no question of rescission—the transaction is void *ab initio*—and fraud does not impart to it, against the will of the defrauded party, a validity that it would not have if the want was due to innocent mistake."

Lord Cairnes applied this principle in Cundy *vs.* Lindsay, 3 App. Cases, 459 saying:

> "With him they never intended to deal. Their minds never for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or contract whatever."

Again this Court said in Ark. Smelting Co. *vs.* Belden Co., 127 U. S. 379, 387:

> "Everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent."

Sir William Anson, in his highly regarded work on contracts, Third American Edition, states at page 207:

> "If a man accepts an offer which is plainly meant for another, or if he becomes party to a contract *by falsely representing himself to be another*, the contract in either case is void, or to put it more accurately, no contract ever comes into existence." (Italics ours.)

Plaintiff "falsely represented himself to be another," namely, the substitute whom he procured to

take the physical examination in his behalf. True, he appeared in his proper person before the superintendent. But he appeared under a false personality before the doctor, or caused another person to be represented as himself, which comes to the same thing. The doctor, who performed a function in the employment no less important than that of the superintendent, never intended to certify the plaintiff, but the other person who appeared before him. As for the superintendent, he intended to employ the person who appeared before the doctor. He had no idea whatever of contracting with the person who had been rejected for physical defects, namely, this plaintiff. Hence, we say, no contract was consummated.

Was the impostor entitled to the benefit of the Federal Employers' Liability Act in the above circumstances?

That Act provides that a common carrier by railroad engaged in interstate commerce,

> "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce. (35 Stat. 65.)

It proceeds, in derogation of the common law, to confer special advantages on its beneficiaries, by eliminating contributory negligence as a defense in bar in all cases under the Act; by eliminating contributory negligence and assumption of risk even in mitigation of damages in all safety appliance cases; and by allowing defendant to be sued in Federal Court in any jurisdiction where it can be found.

In declaring what employes are entitled to the special benefits of this Act, this Court said in Robinson *vs.* B. & O. R. R., 237 U. S. 84, 94, and again in Hull *vs.* P. & R. Ry. Co., 252 U. S. 475, 479:

> "We are of the opinion that Congress used the words 'employe' and 'employed' in the statute in their natural sense, and intended to describe the *conventional* relation of employer and employe." (Italics ours.)

"Conventional" may mean either *customary* or *contractual*. Surely, it cannot be said that fraudulent imposture by an employe upon an employer is the *customary* relationship. Nor, as we have just seen, can it be said that a *contractual* relationship existed in the present case, because of the mistake as to his personality fraudulently procured by the plaintiff. It seems to us perfectly clear that if the existence of a contract of employment—which is the normal and natural relationship between employer and employe—is essential to the right of the employe to have the special advantages of this Act, then this plaintiff does not come within its terms.

The precise question is one of first impression, for we have been unable to find any decision directly in point, and those relied on by the Appellate Court and plaintiff's counsel are distinguishable, as we have shown above.

It was stated by the Court in N. & W. Ry. Co. *vs.* Bondurant, 107 Va. 515, that

> "It would be a hard measure of justice to hold a company responsible on the one hand for fail-

> ure to prescribe rules and on the other to refuse to protect from the consequences of the violation of reasonable and proper rules adopted and promulgated in the discharge of the duty imposed by law."

The closest case on its facts which we have found is Stafford *vs.* B. & O. Ry. Co., 262 Fed. 807 (D. C. N. D. W. Va.). Stafford secured employment as a brakeman, when he was over the prescribed age limit and unable to pass the required physical examination, by inducing another man to assume his name and pass the physical examination. Under the certificate of physical fitness thus issued in Stafford's name he secured his employment, and was injured while so employed. When he brought suit (whether under the Federal Employers' Liability Act does not appear) the above facts were presented in a special plea by defendant. In denying a motion to strike out this plea, District Judge Dayton said:

> "The question is one of first impression, that of a man over (not under) age, and charged to be physically incompetent under the rules of the Company, securing by the fraudulent impersonation of another a service of danger and responsibility, and, notwithstanding his fraud and deceit, seeking to hold the defrauded company responsible for an injury sustained by him in a place where he had no legal or other right to be. Had he not committed the fraud on the Company he would not have been injured. • • •
>
> "The force of the moral side of the question bears strongly, too, in the same direction. Railroad brakemen fill very responsible places in

> railroad operation. Not only the corporation, but the public also, are vitally interested in his physical and other ability to protect both lives and property from destruction."

The Judge accordingly overruled the motion to reject the plea. After filing of the above opinion the case was dismissed on motion of plaintiff, at his costs. It will be observed that the Judge did not discuss the legal significance of the fraudulently procured mistake as to plaintiff's identity as rendering his supposed contract of employment a nullity; but he did give expression to the above very pertinent observations as to the public policy involved in discouraging such impostors.

The general principle was stated by Tindal, C. J., in Horner *vs.* Graves, 7 Bing. 735, 743:

> "Whatever is injurious to the interests of the public is void, on the grounds of public policy."

This Court, too, has not hesitated to consider public policy in determining who are entitled to the benefits of the Federal Employers' Liability Act, particularly in the so-called "primary duty" cases, I. C. Ry. Co. *vs.* Skaggs, 240 U. S. 66; G. N. Ry. Co. *vs.* Wiles, 240 U. S. 444, 448; Davis, Agent, *vs.* Kennedy, 266 U. S., 147; U. V. Ry. Co. *vs.* Caldine, 49 S. C. R. 91.

G. N. Ry. Co. *vs.* Wiles, *supra*, illustrates our meaning. A recovery was there sought in behalf of a rear brakeman. His train was stopped by a pulled out drawbar. He failed to protect the rear of his train as required by the Company's rules. A rear end collision ensued, in which he was killed. This Court

construed the Act as not conferring its benefits on one who thus violated his primary duty to his employer, using this impressive language:

> "We cannot help pointing out that the tragedy of the collision might have been appalling. He brought death to himself and to the conductor of his train. His neglect might have extended the catastrophe to the destruction of passengers in the colliding train. How imperative his duty was is manifest. To excuse its neglect in any way would cast immeasurable liability upon the railroads, and, what is of greater concern, remove security from the lives of those who travel upon them."

The principle that violation of a primary personal duty by an injured man resulting in an accident to him is a ground for excluding him from the scope of this Act seems to apply with full force to this case. Was it not the most primary of all plaintiff's duties to his employer to present himself in his proper person for the physical examination without which he knew that he was neither entitled to enter or remain in defendant's train service? And do not physical defectives who violate that duty, and secure employment in railroad train service through false impersonation of men of sound physique, in the language of the Wiles case, *supra*, cast immeasurable liability upon the railroads and, what is of greater concern, remove security from the lives of those who travel upon them?

It is, of course, obvious that the effect of allowing this plaintiff the benefits of the Act would not be lim-

ited to his case, but would apply to all physical defectives who secure employment in railroad train service by procuring substitutes to pass their physical examinations. The color blind man who thus becomes an engineer and runs past an open switch, the person with a weak heart who thus slips into train service and suddenly collapses in a critical situation, the epileptic who has a fit in an emergency, in short all physical defectives who thus bring immeasurable peril to the lives of their fellow employes and the traveling public would be covered by this precedent, and others would be encouraged to follow their example. Such a result, we think, would be utterly abhorrent to public policy.

It is hardly conceivable that Congress had any such intention in enacting the Federal Employers' Liability Act. This Court pointed out in the Second Employers' Liability Cases, 223 U. S., 1, 48, that enhancing the *safety* and *security* of interstate commerce was a prime purpose of Congress in passing this legislation, and one of the reasons which brought it within the scope of Congressional authority. It said (italics ours):

> "If the *agents* or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or *unsafe* or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the Act of Commerce or make it less expeditious, less reliable, less economical and less *secure*. Therefore Congress may legislate about the agents and instruments of interstate commerce, etc."

Is the Court constrained to give this Act an interpretation which would directly tend to frustrate the safety and security of interstate commerce which it was intended to foster, by holding that its benefits extend to those employes who undermine such safety and security as did this plaintiff, merely because the Act described those entitled to its benefits by the general term "employes" without any express restriction or qualification?

This Court gave a negative answer to a similar question in Holy Trinity Church *vs.* U. S., 143 U. S., 457, 458, 462, 472. There the Court interpreted an Act of Congress which made it unlawful to assist the importation of any foreigner into the United States under an agreement to perform labor or service of any kind in the United States. Holy Trinity Church contracted with a certain Englishman to remove to the City of New York and enter its service as a rector and pastor, which he did. This action was brought to recover the penalty for violation of the statute. The lower court, recognizing that the case came within the literal prohibition of the statute, rendered judgment accordingly. This Court reversed the judgment declaring:

> "It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. • • • But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the Legislature intended to apply them. • • • Unexpectedly, it is

> developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the Courts, under these circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the Legislature, and therefore cannot be within the statute."

That decision was referred to with approval by this Court in American Security Company *vs.* District of Columbia, 224 U. S., 491, 495, as being:

> "A well known example of construing a statute not to include a case that indisputably was within the literal meaning, but was believed not to be within the aim of Congress."

We venture to suggest that, from the standpoint of effectuating public policy and the true intention of Congress, a qualification by the Court in this case of the seeming literal scope of the Act of Congress with the purpose of preventing it from encouraging a menace to that safety of interstate commerce which it was intended to promote, is no less important than was the similar qualification in the case of Holy Trinity Church, *supra*, with the object of preserving the free importation of foreign clergymen.

We submit that the Federal Employers Liability Act should not be interpreted as entitling this plaintiff to its benefits.

Error in Holding the Evidence Sufficient for Finding Defendant Negligent.

We rely on the rule that this Court will examine the evidence in cases under the Federal Employers' Liability Act, thus stated in C., M. & St. P. Ry. Co. *vs.* Coogan, 271 U. S. 472, 474:

> The employer is liable for injury or death resulting in whole or in part from the negligence specified in the Act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several states. This court will examine the record, and if it is found that as a matter of law the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed."

We contend that the evidence of defendant's negligence was insufficient as a matter of law.

The declaration, or complaint, alleged negligence on account of defendant's asserted failure to dim the headlight of the engine by which plaintiff claimed he was blinded. The only evidence that the headlight was not dim consisted in plaintiff's testimony (1) that it was "bright" and (2) that it would not have blinded him if dimmed. (R. 23, 31.) The first was ambiguous, because even a dim headlight is obviously bright. The second was a mere conjecture. Hence his testimony, taken at its face value, was far from conclusive. Moreover, it was absolutely unsupported by any other evi-

dence. Seven witnesses called by defendant testified that it was dim, including the engineer who said he had dimmed the headlight when he reached the yard limits half a mile south of where the accident occurred; two testified that they had not noticed whether it was bright or dim. (R. 111, 124, 142, 168, 185, 197, 207, 227, 238.)

The true rule is thus stated in 10 Ruling Case Law, Evidence, Section 193, p. 1005:

> "In a conflict of evidence, mere number is not in itself controlling, but it certainly is entitled to great consideration, and should control unless there be special reason to credit the evidence of the smaller number."

The Appellate Court avoided passing on the question whether there was sufficient evidence for a finding that the light was not dim, and relied upon other matters, stating:

> "If it be assumed that the light was dimmed, still as we read the record, the plaintiff made out a clear *prima facie* case of negligence against the defendant." (R. 282.)

The Court later explained its position as follows:

> "It is clear from the evidence that (1) there was no ringing of the bell on the locomotive of the caboose train, nor was there any signal or warning given of the start or approach of this train (2) nor was there any lookout with a light on the foremost caboose. The plaintiff introduced evidence that it was the custom and practice when cars and cabooses were shoved at

> night over the lead track where this accident happened to have a man on the foremost car with a light • • • We are satisfied that the jury were warranted in finding that there was such a custom." (R. 283, 284.)

From which the Court concluded that the matter in which the caboose train was handled at night

> "showed such a disregard for the safety of the employes that might be using the crossway"

that the verdict against the defendant was justified. (R. 284.)

This conclusion appears wholly unwarranted upon an analysis of the stated points on which it was based and of the evidence pertinent to each.

(1) No ringing of the bell on the locomotive of the caboose train nor any signal or warning given of the start or approach of this train. This we admit; but deny that it constituted negligence. The Court omitted to point out that the accident occurred in a switch yard. This is alleged in each of the four counts of the declaration. (R. 2, 3, 5, 6.) Plaintiff himself so testified. (R. 34.) So did defendant's yardmaster. (R. 97.) It is apparent, too, from the map of the yard, and the testimony of the switchman who helped to pick plaintiff up after the accident at a point between Switch No. 1 and Switch No. 2, at the crossover, as shown on that map. (R. 78, 208.)

Counsel stated in his reply to our petition for certiorari in this Court that "the accident did not happen at a switch yard proper." (Reply 13.) An amusing

phase is that each count of the declaration alleged that it was in a switching yard, and this fact was relied on as requiring the headlight to be dimmed, but is repudiated in claiming that warning signals should have been given. The claim that it was not in a switching yard proper is diametrically opposed to the facts. The only justification counsel offered was to the effect that *more* switching operations were conducted in the other end of the yard than at this end. The witness he cites testifies that at this end of the yard trains were not "made up," but cars were "kicked" or "shoved" on to the lead tracks. (R. 71.)

The movement of the cabooses which struck and injured plaintiff was plainly a switching movement—getting the cabooses from the caboose storage track on the east side of the depot, hauling them south across Irving Park Boulevard, then backing them north over that boulevard along the track on the west side of the yard on which they were moving when plaintiff was injured, and from there "kicking" them in "to be used on the freights." Plaintiff himself, who had previously worked on this movement, so described it (R. 35); also the switch foreman (R. 206, 207); also the engineer. (R. 121, 123.) The engine used was a switch engine. (R. 120.) Beyond question, this was a switching movement in a switching yard.

Was it negligence to perform such a movement, in such a yard, without a warning bell or other warning signal? This Court has answered that question. It said in Aerkfetz *vs.* Humphreys, 145 U. S. 418, 420, with reference to switching movements in railroad yards:

> "The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employes in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach."

This Court quoted the above from the Aerkfetz case with approval, quite recently, in a case under the Federal Employers' Liability Act, Toledo, St. Louis & Western Ry. Co. *vs.* Allen, 276 U. S. 165, 171, and declared in speaking of an employe injured in a yard switching movement:

> "On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car."

In the present case there was no evidence of any custom to give warning bells, or other audible signals, to warn employes of such movements.

(2) Absence of a lookout man with a light on the foremost caboose which injured plaintiff. We concede the fact; but deny that it constituted negligence in a switching movement, in a switching yard. In the

Aerkfetz case, *supra*, where a track repairer was injured while he was actually working on the track in a switch yard, by a freight car pushed by a switch engine, this Court held:

> "It cannot be said that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employes who had all the time knowledge of what was to be expected." (145 U. S. 418, 420.)

True the Court pointed out before making that statement that the engine was moving slowly; so too in the present case the speed of the engine and attached cabooses at the time plaintiff was struck by the latter was about five miles per hour. (R. 134, 137, 210.)

As if to counteract the above principle, the Appellate Court held, as noted above, that there was evidence from which the jury might find the existence of a *custom* to have a lookout man with a lantern on the foremost car in this particular switching movement. The only direct testimony to that effect was given by a switchman who had worked on this movement. Testifying for plaintiff, he asserted that he never saw it performed without a man with a lantern on the leading car. (R. 71.) But neither that witness, nor any other witness, testified that the man with the lantern would be there for the purpose of warning yard employes out of the way of the movement. Of course, mere failure to comply with a custom not intended to protect him or to comply with any legal duty owed to him, would not constitute negligence as to him. N. &

W. Ry. Co. vs. Gesswine, 144 Fed. 56, 60 (C. C. A. 6th Circuit); 20 Ruling Case Law, page 47.

Plaintiff's other witness on this point testified to the effect that there would be a man on the leading car when there was an intention to make a coupling, and for that purpose. (R. 65.) Testimony of all the other witnesses on this point, including the conductor in charge of the movement and his engineer, was to the effect that it was only while Irving Park Boulevard was being crossed, or a coupling was to be made (neither of which was true when plaintiff was injured) that a man would ride the leading car; otherwise not. (R. 124, 210.) In Carlo *vs.* B. & L. E. R. Co., 143 Atl. 5, 6, 7, a case under the Federal Employers' Liability Act, the Supreme Court of Pennsylvania dealt with the testimony of a brakeman injured in a yard when a train was backed, that it was the custom to sound the whistle in such movements. The Court said:

> "At best, it would be a local custom, pertaining to this particular yard, and, as it would conflict with the ordinary rule or duty as to yards, it must be shown to be actually known to all of the employes who dealt with it."

Assuming, nevertheless, that the alleged custom might be found to have existed as to the movement in which plaintiff was injured, the Appellate Court was nevertheless apparently in error in supposing that its breach in the instant case would in and of itself justify a recovery against defendant. There was absolutely no evidence that any such custom was known to any

responsible officer of the defendant. Its yardmaster and superintendent both testified that the alleged practice was not followed, except in crossing Irving Park Boulevard, or where a coupling was to be made. (R. 83, 164.)

In Illinois Central Ry. Co. *vs.* Hart, 176 Fed. 245, 250, the U. S. Court of Appeals for the Sixth Circuit pointed out that there was no evidence that the custom there relied on was known to the defendant railway company and said:

> "We need not go outside the decisions of this court for authority that such notice is necessary in order to bind the defendant."

Moreover, even if it had been the custom always to have a man with a light on the leading caboose in this movement, it is beyond dispute from plaintiff's own testimony that he did not know of it. His testimony was explicit, that he had worked on this very movement and "once in a while" they had a light on the leading car, "once in a while" not. (R. 35, 36.) Surely, one who does not claim that he knew and relied on an alleged customary practice which is not required by the usual standard of care, is not entitled to recover on account of its breach.

Negligence presupposes duty. The duty owed to an employe is the exercise of ordinary care to prevent his injury. Such duty, under the decisions of this Court, does not require the presence of a man with a lantern on the leading car in switching movements in a switching yard *for the purpose of warning employes who*

may be on or crossing the track. For a custom in and of itself to impose such a duty on a railway company, it must appear that the employe knew of the custom, relied on it, and was prejudiced by its non-observance; and that the railway company, in the exercise of ordinary care, should have anticipated such reliance and prejudice.

The Appellate Court also mentioned that there was a "crossway" over the yard tracks at the point where plaintiff was injured. The attempt to establish by evidence that this was a well-defined path had failed. It was, however, plain that employes were in the habit of crossing and recrossing the tracks frequently in about this same vicinity to get from one side to the other of the yard. Conceding full force to this fact, which is much emphasized in behalf of plaintiff, we cannot see that it has any significance as establishing a higher measure of care to be observed by defendant at this place than is ordinarily required in switch yards.

In the Aerkfetz case, *supra*, we saw that whistles and bells and lookout on leading cars being switched in a yard were not required even in the case of a track repairer who was in plain sight, on the track, his back to the approaching cars, absorbed in his work. So, too, in the case of a car checker who was likewise actually engaged in his work. Toledo, St. Louis & Western Ry. Co. *vs.* Allen, *supra*. It would seem absurd to hold that a yard employe, thoroughly familiar with yard movements, who is merely crossing the tracks with full opportunity to concentrate his attention ex-

clusively on protecting himself against those movements, is entitled to have a higher degree of caution exercised in protecting him against the consequences of his own reckless inattention, than men actually absorbed in their work.

Finally on the matter of negligence, it is extremely important to note that the caboose which struck plaintiff was not put in motion heedlessly, with no attention paid to whether or not there was a clear track ahead. The last stop was made with the cabooses at No. 1 switch, headed north. (R. 131.) See map. (R. 78.) The conductor then went to throw the next switch—No. 2—and stood there. (R. 207.) He was then about seventy-five feet head—north—of the caboose. (R. 207.) Thus he had a clear view of the track along which it was to be kicked towards him. He then gave the signal to cut the cabooses off and kick them ahead. (R. 208.)

The engineer then started up, and had advanced about fifteen feet from where he had stopped, and was just about to increase his speed preparatory to the kick—going about six miles per hour—when the conductor who was still standing at No. 2 switch saw plaintiff dart across in front of the engine of the Belt Line train (which was approaching on a parallel track) towards the track on which the cabooses were being shoved. (R. 124, 208, 210.)

The conductor gave a violent signal to stop the caboose movement; the switchman who was to cut the cabooses off did not do so; the engineer applied the emergency brake and "put the sand on"; and he stopped within thirty or thirty-five feet after striking plaintiff. (R. 124, 210, 215.)

All this affirmatively shows, not heedlessness, but alert watchfulness over the track on the part of the switching crew, in making the movement in which plaintiff was injured. What more could a man on the head end of the caboose, who would not have been in as good a position as the conductor to see plaintiff dart across in front of the Belt Line train from the other side of it, have done to frustrate plaintiff's recklessness by stopping the movement of the cabooses? How could it be negligence on the part of the defendant not to have such a man on the advancing caboose to keep watch over the movement when the conductor was there performing that very function?

As for the suggestion that a man on the head end of the caboose might have had a lantern, how can the absence of such a light be regarded as contributing in any degree to the accident, in view of plaintiff's explicit testimony that he was blinded by the headlight of the Belt Line train as he looked south in the direction from which the cabooses were coming, and could not see anything in that direction as he hurried onto the track on which they were approaching? (R. 24.) Regardless of whether the headlight was or was not dimmed, plaintiff alone knew whether he was blinded as he looked in the direction of the approaching cabooses so that he could see nothing in that quarter; his testimony to that effect was most explicit and positive, and must be accepted as a fact.

We submit that there is nothing in the record to justify the conclusion of the Appellate Court that the jury might properly find negligence on the part of the defendant which was a cause of this accident.

Error in Holding That Plaintiff's Assumption of Risk Was Not Established as a Matter of Law.

The Appellate Court did not discuss the evidence on this point, nor explain its conclusion, but recognized that the question was before it and declared:

> "It was a question of fact—not of law—whether the injury received by the plaintiff was occasioned by or through a peril of his employment, the risk which he had assumed. The jury by their verdict have found in favor of the plaintiff on this issue and we feel that we should not be justified in disturbing this finding."

We rely upon T. St. L. & W. R. R. Co. *vs.* Allen, *supra*, where, although the jury had found against defendant, this Court examined the record, and, finding that assumption of risk was established as a matter of law, reversed the judgment, indicating that it would follow that course in cases under this Act.

The well recognized general principle there stated, on which we rely, was:

> "The employe assumes the ordinary risks of his employment and, when obvious and fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employes."

The circumstances on which we rely for establishing assumption of risk as a matter of law are briefly these. The Appellate Court refrained from holding the evidence sufficient for a finding that the Belt Line

engine was operated with an undimmed headlight in the yard limits. This would seem to eliminate the necessity of dealing with the supposition that this headlight was undimmed. It may not be amiss, however, to point out that if it was not dimmed, that fact was perfectly obvious to plaintiff and in knowingly crossing through its rays he assumed the evident risk of being temporarily blinded as he looked in that direction, and of being in that condition before he crossed the next track, on which he knew that unlighted cabooses might be backing up from the direction of the headlight. (R. 36.)

Assuming that there was no justification for a finding that the headlight was not dimmed, still plaintiff's testimony is absolutely positive that he was blinded by its rays as he looked in that general direction which, whether the headlight was dimmed or not, must be taken as a fact, since he alone could testify on that point. He could not see the approaching caboose until it emerged from behind the headlight, when, as he testified, "I tried to get out of its way. It struck and knocked me down". (R. 25.)

This can only mean that plaintiff had not remained in a position of safety, as he could perfectly well have done, in the space of nineteen feet, center to center, between the track he had just crossed and the one on which the cabooses were coming, until his vision might improve, and he could see whether the track was clear. On the contrary, knowing that cabooses might be approaching on the track, in his own words he "kept right on going", unable to see a thing in that direction,

until he was in a position where he could not avoid being knocked down by the caboose. (R. 24, 25.) This risk was perfectly obvious, and known to plaintiff, and he plainly assumed it in hurrying on, instead of stopping until he could see what, if anything, was coming on the track.

At this point it seems pertinent to briefly recapitulate all the grounds which the Appellate Court considered for the establishment of defendant's negligence. Alleged maintenance of an undimmed headlight on the Belt Line train was not found by the Court to be established, as noted above. Failure to sound a warning whistle or bell, or give other audible signal of the approach of the cabooses, was emphasized by the Court; but, in the complete absence of any testimony that such signals were customary, could not constitute negligence in a yard switching movement, under the rule in the Aerkfetz case, *supra*. The implication in the Appellate Court's opinion that the cabooses were moved without regard to whether or not the track was clear was completely rebutted by the evidence, which the Court did not mention, that the conductor in charge of the movement was in a perfect position to see that the track was clear.

The only remaining point mentioned by the Appellate Court was the admitted absence of a lookout with a light on the foremost caboose, in connection with the Court's holding that there was sufficient evidence from which a custom to maintain such a lookout might be inferred. Assuming that there was adequate evidence on that point and that the lookout would be there for

the purpose of protecting employes who might be on the track (both of which suppositions we have previously negatived) still the plaintiff testified that he knew that such a practice was not always observed, and further that he knew, just before he was injured, that cabooses might be approaching without observing the alleged custom. Thus, any risk involved in the alleged negligence on which plaintiff's case finally rests was "obvious and fully known and appreciated by him," and the risk incident thereto was plainly assumed.

In his reply to our petition for certiorari in this Court, counsel for plaintiff attempted to put us in the position of insisting that plaintiff should not have crossed in front of the Belt Line train, when he had plenty of opportunity to do so in safety, but should have unnecessarily waited for this long slow moving train to pass when he was in a hurry to get back to work. Our chief contention is that, having crossed in front of this train, and become blinded by its headlight, he should have waited where he was in a position of safety until his vision cleared before crossing the next track, and not have gone on to it blindly when he knew that unlighted cabooses might be approaching.

Counsel also contends that we confuse contributory negligence with assumption of risk. We do not. Of course, assumption of risk may well involve an element of negligence; but there is in assumption of risk an element of knowledge of impending danger, which distinguishes it from mere negligence. 39 *Corpus Juris*, 721. To illustrate, if plaintiff had not known that cabooses might be approaching and had failed to

look up and down the track before crossing it, the omission of this precaution might have constituted nothing more than contributory negligence. It is his admitted knowledge of the yard and its operations and of the fact that the cabooses might be approaching that makes his going on to the track in front of them, when he knew he was in a blinded condition and could not see them, an assumption of the risk.

In this respect plaintiff's case is on all fours with the case of plaintiff in T., St. L. & W. R. R. Co. *vs.* Allen, *supra*. The plaintiff there, a car checker, was checking a string of cars, between two tracks, in a switch yard. He was struck by cars which were being kicked in at a speed of four to six miles per hour, which were unlighted and unattended and moved without warning. This Court, after pointing out that the members of the switching crew had a right to believe that plaintiff would keep out of the way of the shunted car, declared:

> "In any event plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him."

Plaintiff's counsel seemed to imply that it would be necessary for plaintiff to have positive knowledge that a caboose was actually bearing down upon him in order to charge him with assumption of risk in going on the track in front of it. But such explicit knowledge of the impending peril as to make it practically attempted

suicide to incur it, is not necessary to establish assumption of risk. It suffices, as held in T., St. L. & W. R. R. Co. *vs.* Allen, *supra*, that plaintiff knew, in the words of the Court, that cars "were *liable* to be shunted without warning to him" along the track where he was struck.

We respectfully submit that judgment against defendant should be reversed.

HENRY S. MITCHELL,
JOHN E. PALMER,
Counsel for Petitioner.

JOHN L. McINERNEY,
JAMES L. HETLAND,
Of Counsel.

February, 1929.

MAR 7 1928
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 454

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Petitioner,

vs.

JOHN ROCK, Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND/OR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY BRIEF FOR PETITIONER.

HENRY S. MITCHELL,
JOHN R. PALMER,
Counsel for Petitioner.

JOHN L. McINERNEY,
JAMES L. HETLAND,
Of Counsel.

INDEX.

Subject Index.

	Page
Reply brief for petitioner:	
I. Jurisdiction	1
II. Miscellaneous	4

Table of Cases Cited.

Kenna v. Calumet Ry., 306 Ill. App. Ct. Repts., 17, 44	2
Reivitz v. Chicago Rapid Transit, 327 Ill., 207	3
Soden v. Claney, 269 Ill., 98	3
United States v. Carver, 260 U. S., 482	3

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 454

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

JOHN ROCK, RESPONDENT.

REPLY BRIEF OF PETITIONER.

(After allowance of writ.)

I.

Jurisdiction.

The respondent's brief begins with a reargument of the contention that this Court was without jurisdiction to issue the writ of certiorari because the Appellate Court of Illinois was not the highest court of the State in which a decision in this case could be had. We would suppose that this question had been passed on and finally disposed of by this Court when it issued

the writ, at which time it had before it respondent's brief and our briefs, in which the point of lack of jurisdiction was fully argued. In case, however, that question is still open we submit the following.

Respondent's point is that we failed to apply to the Appellate Court, First District, for a certificate of public importance, in addition to seeking a writ of certiorari from the Supreme Court of Illinois to the Appellate Court, and that for this reason we failed to secure a final judgment or decree in the highest court of the State in which such judgment could be had, the Supreme Court of Illinois.

As we previously pointed out, the Appellate Court, First District, in a case analogous to ours under the Federal Employers' Liability Act, Kenna vs. Calumet Ry., 206 Ill. App. Ct. Repts. 17, at page 44, refused to issue a certificate of importance on the ground that application to the Supreme Court of Illinois for a writ of certiorari was the correct procedure. The Appellate Court there stated:

> "This method of review (by certificate of importance) was provided primarily for cases not otherwise reviewable, and while there are exceptions to the general rule, we see no reason why the appellant in the instant case should not make its application to the Supreme Court for a writ of certiorari."

Respondent's present brief makes no answer to the foregoing ruling of the Appellate Court, First District, except to point out that certificates of importance have been granted in four cases, cited at page 7

of respondent's brief, in which damages for personal injuries were claimed. Our reply to this is that only one of these cases, Reivitz *vs.* Chicago Rapid Transit, 327 Ill. 207, was a decision by the First District of the Appellate Court subsequent to the Kenna case, *supra*, and must be assumed to have presented some unusual feature making it one of those exceptions to the general rule the existence of which was recognized in the above-quoted passage from the Kenna case. It is not to be presumed that the Court would have recognized the present case as constituting such an exception.

Moreover, our application to the Supreme Court of Illinois for a writ of certiorari, which was denied, did in effect result in a final judgment or decree of that Court affirming the judgment of the Appellate Court, for, as we pointed out in our reply to respondent's brief opposing the issuance of the writ in this Court, the Supreme Court of Illinois squarely held in Soden *vs.* Clancy, 269 Ill. 98, that while its denial of a writ of certiorari does not necessarily mean an approval of the reasons on which the Appellate Court based its judgment, still—

> "it is an approval of the conclusion reached and, therefore, in effect an affirmance of the judgment."

Respondent's only answer to this consists in referring to the fact that no such significance attaches to a denial of ceriorari by the Supreme Court of the United States, which, as this Court pointed out in U. S. *vs.* Carver, 260 U. S. 482, "imports no expression of opinion on the merits of the case."

Obviously, however, this Court was not there undertaking to explain the significance of a denial of certiorari in some other Court, and the above-quoted statement of the Supreme Court of Illinois conclusively determines what is involved in a denial by that Court of a writ of certiorari, namely, an approval of the conclusion reached by the Court below and in effect an affirmance of the judgment. It plainly follows from this that we did secure a review of this case and in effect a final judgment or decree from the Supreme Court of Illinois. And, of course, such being the case, it is wholly immaterial whether or not we might have secured such a result by following some other method.

II.

Miscellaneous.

On page 8, line 10, of respondent's brief there is a statement that when plaintiff applied the second time to the yardmaster for employment plaintiff "told him he had been rejected as Joe Rock," citing Record 53, 55, 92. An examination of the Record at these points shows that it does not clearly support the quoted statement. The yardmaster clearly testified that he was not informed "that plaintiff had been rejected" (R. 92).

On page 19, line 23, of respondent's brief there is a flat statement that the headlight on the Belt Line locomotive "had not been dimmed," citing Record 24. There is no such direct statement in the Record. At page 24 plaintiff merely testified that the headlight

was "bright," and that it blinded him. Even a dimmed headlight is bright, and obviously blinding to a certain degree.

On page 19, third line from the bottom, of respondent's brief there is a statement that the distance between the track on which the Belt Line train was approaching and that on which the cabooses were moved was about fifteen feet. Application of the scale on the original map in evidence (reproduced on reduced scale opposite page 78 of the Record) shows that the distance between these tracks, center to center, was eighteen feet eight and one-half inches.

On page 20, near the bottom, there is a statement that the conductor in charge of the caboose movement saw plaintiff coming toward the track and "*nevertheless* signaled the engineer to shove the cabooses north." The plain implication that he gave the signal for the movement after he saw plaintiff approaching the track, which is repeated on the next page, is not correct. The conductor testified at Record 212, 213, 215 that he did not see plaintiff until *after* he had given the signal for the movement of the cabooses. Moreover, the Appellate Court did not suggest any negligence on the part of the conductor.

On page 24, line 8, of respondent's brief there is a statement that "there was no regular time for making this caboose movement (R. 35)." Page 35 of the Record does not support that statement. On the contrary, there is direct testimony at Record 237 that the caboose movement was performed at the "usual" time.

At page 26, last four lines, of respondent's brief there is the following statement:

> "A lookout man upon that caboose could have plainly seen plaintiff in ample time to have prevented the caboose train from starting, to have stopped it after it had started, or to have warned plaintiff of its approach."

He could not have seen plaintiff in time to prevent the caboose movement from starting, because at the time of the starting the Belt Line train was between the two. As for stopping it after it had started, or warning plaintiff of its approach, the conductor who was on the ground in front of the cabooses looking towards them, and who saw plaintiff, was in a position to discharge these functions, as soon as the nature of plaintiff's rash act was appreciated and the need to do so became apparent.

On page 38 of respondent's brief, about the middle, there is a statement that plaintiff did not know that these cabooses would be moved as they were, to which we reply that he testified explicitly that he knew they *might* be so moved (R. 36), and that this is sufficient to charge him with assumption of risk under the rule in the Aerkfetz case where this Court found it sufficient that the injured man knew that cars "were *liable* to be shunted without warning to him." (Italics ours.)

On page 39 of respondent's brief, it is argued that plaintiff was justified in crossing in front of the Belt Line train in order to avoid an extremely long delay in waiting for it to pass when he was almost due back at his work. No answer, however, is offered to the more important question as to why plaintiff did not

pause in a position of safey after he had crossed in front of the Belt Line train, until he could see where he was going, instead of rushing across more tracks in a blinded condition.

Respectfully submitted,

HENRY S. MITCHELL,
Counsel for Petitioner.

Office Supreme Court, U. S.
FILED
OCT 15 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 454.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Petitioner.

vs.

JOHN ROCK,
Respondent.

Reply to Petition for Writ of Certiorari.

HERBERT H. PATTERSON,
155 NORTH CLARK STREET,
CHICAGO, ILLINOIS.
Counsel for Respondent.

CHURCHILL LAW PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
The petition should be dismissed for want of jurisdiction	1
The relation of master and servant existed between the respondent and the petitioner	3
The question of assumed risk was properly submitted to the jury	13
Petitioner was guilty of negligence	13

AUTHORITIES CITED.

	PAGE
American Car & Foundry Co. v. Armentraut, 214 Ill. 509	11
Baker v. Beattie, 222 S. W. 658	10
Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385 (Affirmed, 241 U. S. 211)	27
Cahill's Revised Statutes of Illinois, Section 120, Chapter 110	1
Central Railroad Company of New Jersey v. Colasurdo, 192 Fed. 901	22
Chesapeake & Ohio R. R. Co. v. De Atley, 241 U. S. 310	20, 23
Delaware, L. & W. R. Co. v. Hughes, 240 Fed. 941	29
Denver R. G. R. Co. v. Reiter, 47 Col. 417, 107 Pac. 1100	10
Engel v. C. B. & Q. R. R. Co., 111 Neb. 21, 195 N. W. 523	23
Fisher v. Perkins, 122 U. S. 522	2
Frazier v. Interstate Railroad Co., 264 Fed. 96	28
Gila Valley, etc., Ry. Co. v. Hall, 232 U. S. 94	21
Grand Trunk Railroad Co. v. Ives, Admr., 144 U. S. 408, 417	30

Gregory v. McVeigh, 23 Wall. 295 3
Indiana, Illinois & Iowa R. R. Co. v. Otstot, 212 Ill. 429 24
Lake Shore and M. S. R. Co. v. Baldwin, 19 Ohio C. C. 338 9
Lupher v. Atchison, T. & S. Fe Ry. Co., 81 Kan. 585, 106 Pac. 281 ..... 8, 12
Matlock v. Williamsville, etc., Ry. Co., 198 Mo. 495, 95 S. W. 849 10
Payne, Director General v. Daughtery, 283 Fed. 353 6
Philadelphia B. & W. R. Co. v. Tucker, 35 App. D. C. 123 (Affirmed, 220 U. S. 608) 28
Seaboard Air Line v. Horton, 239 U. S. 595 19
Stratton v. Stratton, 239 U. S. 55 3

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 454.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Petitioner.

vs.

JOHN ROCK,
Respondent.

Reply to Petition for Writ of Certiorari.

I.

THE PETITION SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

The Appellate Court of Illinois was not the highest court of the State of Illinois in which a decision in this case could be had.

Section 120, Chapter 110, Cahill's Revised Statutes of Illinois, provides as follows:

> "In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals and writs of error are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court

or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such cases grant appeals to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in said Appellate Courts it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court: * * *"

The complete record in this case discloses that no certificate of importance was ever asked for or denied in the Appellate Court of Illinois. That court had before it the entire record of the proceedings, and it might have granted a certificate of importance, in which event the Supreme Court of Illinois would have taken the case and passed judgment upon it. The defendant did, however, petition the Supreme Court of Illinois for a writ of certiorari. The petition was denied, and the court never took the case for review and determination. Petitioner, therefore, did not, in accordance with Section 237, Volume 43, Par. I, United States Statutes at Large, page 937, exhaust in the state courts the means at hand for obtaining "a final judgment or decree * * * in the highest court * * * in which a decision in the suit could be had, * * *"

In *Fisher* v. *Perkins*, 122 U. S. 522, under like circumstances, it was held:

> "The want of a certificate is good reason for refusing to allow an appeal, but until it has been asked

for and refused, its absence furnishes no ground for a writ of error from this court."

"As it is, we find nothing in the record to show that the suit could not have been taken to the Court of Appeals if the necessary application had been made, and, consequently, we have no right to proceed. * * * The judgment is still the judgment of the Superior Court, which is not the highest court of the state, and it might have been taken to the Court of Appeals for review if the grant of an appeal had been applied for and secured."

Although the defendant took one and not the other of two courses open to it and filed its petition for writ of certiorari in the Supreme Court of Illinois, still the judgment against it might have been taken to the Supreme Court of Illinois for review if the Appellate Court of Illinois had been asked to and had granted a certificate of importance in the cause. Everything was not done that could be done to take the case to the highest court of the State of Illinois.

Gregory v. *McVeigh*, 23 Wall, 294.
Stratton v. *Stratton*, 239 U. S. 55.

If this court should hold that it has jurisdiction to entertain this petition, then in reply to petitioner's brief and argument we submit the following:

II.

THE RELATION OF MASTER AND SERVANT EXISTED BETWEEN THE RESPONDENT AND THE PETITIONER.

We will hereinafter refer to petitioner as defendant and to the respondent as plaintiff.

It is admitted that the plaintiff and the defendant were engaged in interstate commerce at the time of the acci-

dent (R. 21). Regardless of this admission defendant now contends that the relation of master and servant did not exist within the meaning of the Federal Employers' Liability Act, between them, because plaintiff at the time he was employed had another man take the physical examination required by the defendant, this other man representing plaintiff at the time. Plaintiff then went to work as a switchman and continued in that employment for fourteen months prior to the time of the accident which necessitated the amputation of his left leg. In determining whether this misrepresentation by plaintiff prevented the existence of the relation of master and servant under the Federal Act, we call attention to the fact that his physical condition in no way contributed to his injury. The Appellate Court of Illinois specifically states in its opinion that "the defendant concedes in the oral argument that the physical condition of the plaintiff at the time of the accident did not contribute in any way to his injury" (R. 278). From the record it may reasonably be inferred that the defendant's yardmaster, John P. O'Haire, knew when plaintiff made the second application for employment that he was the same man that had applied for work a few weeks before and that he had been rejected because of a rupture and certain other abdominal operations that he had undergone. The Appellate Court sums up the evidence on this question on page 276 of the record as follows:

> "It appears that the plaintiff made two applications for work with the defendant company. In the first he gave his real name and in the second he gave the name of John Rock. The night yardmaster of the defendant testified that on the occasion of the second application he gave the plaintiff a letter to the superintendent in which the plaintiff was named 'John Rock' or 'J. J. Rock'; that everybody called him Joe; that he is known there to this day as Joe Rock; that he put the plaintiff to work as John Rock,

but that he knew he had been called Joe right along. The testimony of the plaintiff is to the effect that when he made the second application the yardmaster knew that he was the same person who had been rejected under the first application. It is clear from the record that the plaintiff in the instant case is the person who sustained the injuries for which the suit was brought. The defendant did not file or offer to file a plea in abatement, and 'a misnomer of the plaintiff can only be pleaded in abatement and is no ground for setting aside the proceedings.' (*Springfield Ry. Co.* v. *Hoeffner*, 175 Ill. 634, 644. See also *Salisbury* v. *Gillett*, 2 Scam. 290; *Moss* v. *Flint*, 13 Ill. 571.)"

From this statement of the evidence by the reviewing court of Illinois it is clear that the defendant's contention in its petition to the effect that there was "a mistake as to the identity of the plaintiff" is unfounded.

Regardless of the foregoing facts it is our position (A) that this first point raised by defendant presents no Federal question for review; and (B) that if we assume that a Federal question is presented, the plaintiff's misrepresentation in securing his employment did not prevent the relation of master and servant from existing between him and the defendant.

(A) No Federal Question is Presented Under Defendant's Point I.

The relation of master and servant is determined by the general law of contracts. There is nothing in the Federal Employers' Liability Act that requires the application of anything other than the general rules of law in determining whether the employee and employer relationship existed in the case at bar. No matter if an employee's right of action is based upon common law, upon a state statute or a Federal statute, the tests and

rules invoked in determining the existence of the relationship are the same. We submit that this contention presents no Federal question and that therefore this court is not called upon to review that phase of the case.

(B) The Relation of Master and Servant Existed Between Plaintiff and Defendant.

If it should be held that the plaintiff's misrepresentation in securing his employment does present a Federal question for review we then contend that if everything in connection with the manner in which his employment was secured is considered, he was nevertheless at the time he was injured, an employee of the defendant within the meaning of the Federal Employers' Liability Act. For fourteen months prior to the accident he had done defendant's work and had received pay for that work. It is conceded that his physical condition in no way contributed to his injury. The night yardmaster, O'Haire, admitted that although he made his second application in the name of John Rock instead of Joe Rock that the only name he was known by in the yard all the time he worked there was "Joe" Rock (R. 91). Could the occurrence of the accident while he was a paid employee of the defendant, work a retroactive dissolution of his contract of employment?

The Appellate Court of Illinois quotes from and follows two cases in which the precise question now urged was decided adversely to the contention raised by the defendant (R. 279, 280). One of these cases is that of *Payne, Director General* v. *Daugherty*, 283 Fed. 353, decided by the United States Circuit Court of Appeals for the Eighth Circuit. It was a suit brought to recover damages for personal injuries sustained by a railroad switchman while at work in interstate commerce. The defendant admitted that the car on which the plaintiff was at work

when injured was defectively equipped and that it was being moved in interstate transportation but denied that plaintiff was its employee, because the proof showed that he had "obtained his position by fraudulent misrepresentations of his former employment and concealing prior injuries, that he was a victim of epilepsy, to which his fall was attributed in whole or in part * * *." In affirming a judgment for the plaintiff the court said, Opinion 354:

> "(1) A principal contention, embraced in a number of assignments, is that the trial court erred in excluding evidence offered to defeat the action, on the ground that the plaintiff fraudulently secured his employment, as pleaded, and in refusing instructions tendering such defense. In our opinion, the rulings were correct. The complaint is not that proof is incompetent which tended to attribute the fall from the car to prior injury or affliction. That is far different from permitting a retroactive dissolution of the relation of master and servant, by virtue of the contract, which, even if voidable, was, while it subsisted, attended with the duty, required by law, for the safety of the latter. Cases are cited involving different facts, but of contrary import in principle. We regard the decisions such as *Lupher v. Atchison, T. & S. F. Ry. Co.*, 81 Kan. 585, 106 Pac. 284, 25 L. R. A. (N. S.) 707, as declaring the sound and just rule, namely, that there is liability to the employee, notwithstanding the inducement to the contract. Furthermore, this action was brought under the federal Employers' Liability Law (35 Stat. 65 (Comp. St. Secs. 8657-8665)) and the fault of the defendant was alleged under the Safety Appliance Acts (27 Stat. 531; 32 Stat. 943 (Comp. St. Secs. 8605-8615)). And in our opinion we should hold that the defense urged was not available, in view of the positive terms of sections 1 and 5 of the former act. See *Phila., Balt. & Wash. R. R. v. Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911;

Chicago & Alton R. Co. v. *Wagner*, 239 U. S. 452, 36 Sup. Ct. 135, 60 L. Ed. 379; *Spokane & Inland R. R.* v. *Campbell*, 241 U. S. 497, 36 Sup. Ct. 683, 60 L. Ed. 1125."

Another case cited by the Appellate Court is that of *Lupher* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 81 Kan. 585, 106 Pac. 284. There it appears that the plaintiff obtained his position by misrepresenting his age when he applied for work. A rule of the company forbade the employment of minors as brakemen and plaintiff, eighteen years of age, knew that, and that he could not obtain employment unless the defendant believed he was twenty-one. After working several months he was injured and brought suit to recover damages therefor. As in the case at bar, plaintiff's own testimony disclosed all of these facts. At the close of all the evidence the trial court directed a verdict for defendant "upon the ground that his misrepresentations in securing his employment prevented the establishment of the relation of master and servant, and that at the time of his injury he was either a trespasser or at most a mere licensee to whom the company owed no other duty than not to injure him wrongfully or wantonly." The Supreme Court of Kansas reversed this ruling of the trial court and in so doing after pointing out that the case of *Fitzmaurice* v. *N. Y. etc. R. R. Co.*, 192 Mass. 159 (relied upon by defendant in the instant case) was not analogous on the facts, said:

> "• • • the seeker of employment does, it is true, procure his contract by false representations, but having obtained it, he begins the performance of service for the benefit of the company, and renders it an equivalent for all that he receives from it. True, the company could at its option, upon discovery of the deceit, discharge him at any moment (26 Cyc. Law & Proc. p. 989), but even then he would be

entitled to compensation for the time he had served, not necessarily at the agreed rate, but according to the reasonable value of his services. *Anstee* v. *Ober*, 26 Mo. App. 665. *The relation of master and servant exists in virtue of the one party performing valuable services which are accepted and paid for by the other.* If Lupher had arrived at full age before the accident occurred, it would hardly be contended that he was still a trespasser. Yet he would still have been working for the company under a contract he had obtained by misrepresentation. The difference would be that his arrival at majority would have rendered it absolutely impossible that any injury should result to the company from the deception."

A similar proposition was before the court in *Lake Shore & M. S. R. Co.* v. *Baldwin*, 19 Ohio C. C. 338, where the court said (Opin. 341):

"A large number of cases have been cited where it was held that persons wrongfully upon trains were trespassers, and not entitled to the protection of the railroad company, and learned counsel for the railroad company insist with great vigor and earnestness that, under the state of facts in this case, Baldwin was a trespasser and wrongdoer; that he procured his employment in the service of the railroad company by false pretense; that he was wrongfully upon the train where he was injured; that, being a wrongdoer and trespasser, the company owed him no duty to provide a safe place for him to work and safe appliances and machinery to do his work. * * * The rule of the railroad company requiring its employees to be twenty-one years of age is a reasonable one, but we cannot agree with counsel that the false statement of Glenn Baldwin as to his age made him a trespasser upon the cars and tracks of the railroad company * * *. Putting it as strongly as counsel for the company can put it, that he falsely represented his age to the company,

> and colluded and connived with George Davis to deceive the company, we still think that, while he was in the actual service of the railroad company, he was entitled to the protection of an employee. The fact that he had misrepresented his age, and the further fact that he was a minor, did not make the contract for service void, but voidable. The railroad company, having been deceived, on the other hand, could terminate it whenever it discovered the deception; but, until one party or the other put an end to the relations, the contract continued to exist."

In *Baker* v. *Beattie*, 222 S. W. 658, the Texas Court of Civil Appeals held that the fact that an injured switchman had made false statements in his application for employment as to his age and as to prior injuries he had sustained did not make void his contract of employment so as to destroy the relation of master and servant.

In *Matlock* v. *Williamsville, etc. Ry. Co.*, 198 Mo. 495, 95 S. W. 849, the Supreme Court of Missouri held that the fact that plaintiff's intestate fraudulently represented himself to be of age in order to obtain his employment and that such representation was believed by the defendant, constituted no defense in a suit brought for damages for his wrongful death.

In *Denver R. G. R. Co.* v. *Reiter*, 47 Colo. 417, 107 Pac. 1109, it was held that although a railroad brakeman had deliberately made fraudulent representations as to his age in order to obtain the employment at which he was at work when injured, nevertheless, "the law is well settled" that the plaintiff by such misrepresentations, believed and relied upon by the employer, was not "thereby barred from a recovery for injuries which he may suffer from the negligence of his employer * * *."

The courts of Illinois have repeatedly held that although a minor misrepresents his age in order to obtain

employment, such misrepresentation is not a bar to an action brought to recover damages for injury sustained while such minor is at work under a contract of employment so obtained. It was so held in *American Car & Foundry Company* v. *Armentraut*, 214 Ill. 509.

Defendant cites *Stafford* v. *B. & O. R. R. Co.*, 262 Fed. 807 and a Virginia case,—*Norfolk & Western Ry. Co.* v. *Bondurant*, 107 Va. 515. The *Stafford* case was not decided by a reviewing court, but by a district judge on the plaintiff's motion to strike out defendant's special plea setting up the fact that Stafford had secured his employment much as plaintiff did in the case at bar. Plaintiff by this motion contended that the matters set up in the plea had no proper place in determining his rights. The trial court overruled the motion to strike saying that "a number of questions, such as consent to the substitution (*i. e.*, having someone else take the required physical examination) for example, might arise on trial that could not be determined in advance on this motion to reject the plea." The trial court thought that defendant should be permitted to show all the facts connected with the manner in which plaintiff obtained his employment when the case was called for trial and for that reason allowed the plea to stand. This *Stafford* case did not, therefore, hold that the fraudulent act of Stafford in having a substitute take the physical examination necessary in order that he might obtain employment himself, prevent the relation of master and servant from existing between Stafford and the defendant company at the time he was injured.

The case of *Norfolk & Western Ry. Co.* v. *Bondurant*, 107 Va. 515, does sustain the defendant's contention in the case at bar. If that case is studied it will be observed that it is based upon the decision in *Fitzmaurice* v. *N. Y. etc. R. R. Co.*, 192 Mass. 159, now relied upon by

defendant. The facts in the *Fitzmaurice* case, so wholeheartedly adopted by the Supreme Court of Virginia, are in no way analogous to the facts in the *Bondurant* case, or to the facts in the case at bar. Fitzmaurice was a passenger on defendant's road and admitted making fraudulent statements in order to obtain a ticket which but for her fraud would not have been sold to her. The distinction between the *Bondurant* case and the *Fitzmaurice* case is well stated by the Supreme Court of Kansas in the case of *Lupher v. Atchison, T. & S. Fe Ry. Co.*, 81 Kan. 585, as follows:

> "The substance of the Massachusetts case is that one who uses a railroad ticket obtained at a reduced rate by fraudulent representations is not a passenger in the sense of being entitled to protection as such, and stands in no better position than a mere trespasser. This is the general doctrine, to which there seems to be no dissent. 6 Cyc. Law & Proc. p. 538. The Virginia court took the view that, by parity of reasoning, one who obtains employment from a railway company by a false statement as to his age is prevented by his fraudulent act from becoming an employee. We think the two situations are obviously dissimilar. The analogy is not close enough to warrant the application of the same rule. Among other differences may be noted this: In the one instance a person desiring to be transported from one point to another fraudulently procures the railway company to render him that service, a service which is wholly for his benefit, and in which the company has no interest whatever. He obtains by false pretenses something of value to himself for which he renders no equivalent. In the other the seeker of employment does, it is true, procure his contract by false representations, but, having obtained it, he begins the performance of service for the benefit of the company, and renders it an equivalent for all that he received from it."

Under the foregoing decisions we submit that the relation of master and servant existed in the case at bar between the plaintiff and defendant and that plaintiff's status at the time he was injured was that of an employee under the provisions of the Federal Employers' Liability Act.

III.

PLAINTIFF DID NOT ASSUME THE RISK. THAT QUESTION WAS PROPERLY SUBMITTED TO THE JURY.

DEFENDANT WAS GUILTY OF NEGLIGENCE THAT PROXIMATELY CAUSED PLAINTIFF'S INJURY.

Defendant contends under Point II that the plaintiff assumed the risk of his injury and under Point III that defendant was not guilty of negligence that proximately caused or contributed to cause the injury. It is necessary in considering these two questions to review the evidence bearing upon these issues. We will make this review of the evidence at this point and later under Points A and B cite the cases applicable on each proposition.

Defendant's Exhibit No. 1 (R. 78) is a diagram showing the place of the accident. Irving Park boulevard, there shown, was a much traveled east and west public street and highway in the City of Chicago. Plaintiff was injured while crossing the tracks on a well defined pathway about 75 or 100 feet north of this public street. At this place there were two main line tracks and two lead tracks (R. 78, Diagram Deft. Ex. 1). The accident did not happen in a switching yard proper. Trains were broken up and made up and cars were shunted in onto various classification tracks about a mile farther north at Lawrence avenue, the south end of these various classification tracks being some two or three hundred

feet north of Irving Park boulevard (R. 20). At the south end of the yard and just north of Irving Park boulevard where the accident happened, cabooses were occasionally moved in along the lead tracks in order to be placed in upon the south end of trains that had been made up on the various switching tracks by the switching crews working from the north end of the yard at Lawrence avenue. Transfer trains and other trains frequently passed over the main tracks and the two lead tracks at the place of the accident. Trains were not made up or broken up, however, at the south end of this yard (R. 71; R. 21).

On the day of the accident plaintiff and his crew had been working from 3 o'clock in the afternoon up at the north end of the yards switching cars and making up trains. About 8:30 or 9 o'clock in the evening they came with the switch engine from the north end of the yard at Lawrence avenue down to a point near the depot just north of Irving Park boulevard, where their engine was left standing on the east side of the tracks while they had their lunch (R. 21). They had twenty minutes in which to eat and get back to work (R. 22). Some of the crew went into the depot while plaintiff went from the engine standing on the east side of the four tracks near the depot, shown in the diagram as Defendant's Exhibit I (R. 78), west, across the tracks to have his lunch. He was there about fifteen minutes and on his way back stopped at the oil house on the west side of the tracks north of and near to Irving Park boulevard to fill his lantern (R. 22). After filling and lighting his lamp he started east to go across the tracks back to his engine, still standing on the west side of the tracks. His twenty-minute lunch period was about up and when he got near to the most westerly track he saw a long freight train at about Irving Park boulevard

coming north toward him at about three miles per hour (R. 24). The headlight on the locomotive had not been dimmed, contrary to the custom and practice in entering and moving through the yard. Plaintiff, seeing this long train of about eighty cars (R. 31) coming at about three miles per hour, and knowing that his crew would be delayed unless he went across the tracks ahead of it, started to do what any ordinarily prudent person would do under the circumstances, namely, get back to his work rather than stand idly by while this eighty-car train passed him. He crossed this most westerly track about 75 feet ahead of this incoming transfer train. He had ample time to cross and did cross in front of it. It was about fifteen feet from the track on which the freight train was approaching to the track next east of it (R. 24). After crossing this track on which the train was coming, he looked both north and south but could not see anything coming from either direction (R. 24). As he looked to the south, after crossing this first track, the bright headlight on the locomotive pulling the train upon the first track so blinded him that he did not and could not see some cabooses coming from the south upon the second track until they were about ten feet away from him (R. 24, 25). He was struck by these cabooses and dragged a distance of about thirty or forty feet and injured (R. 25).

There was no light upon the caboose train that struck him and no man riding it as a lookout and there was no warning of its approach given by engine bell, whistle or otherwise (R. 25). These cabooses attached to the locomotive that shoved them to the north *had been standing still* about one hundred and twenty-five feet north of Irving Park boulevard on this second track (R. 213). They did not move over twenty feet before striking the plaintiff (R. 215), and they were started from where

they had been standing without any kind of signal or warning whatsoever.

Defendant's conductor admitted that he saw the plaintiff cross the first track in front of this oncoming train but that he nevertheless signaled the engineer to shove the cabooses north on the next track over which plaintiff had to cross and "gave no signal at all of any kind" except to so move them, "from the time he saw that man until he was hit" (R. 213, 214). He gave no signal to stop the cabooses until "the man went behind the cabooses; that was right when he got on the track" (R. 214).

The place where plaintiff crossed was a well defined and much traveled way leading from the depot on the east side of the tracks over to the oil houses, the ice house, the restaurant and the switchmen's shanty on the west side of the track. Yardmaster O'Haire admitted that it was a fact that hundreds of workmen crossed there right along every week from day to day (R. 86). Defendant's engineer testified that switchmen, railroad men and car repairers crossed that track day and night from the oil houses across to the depot and that he had seen them do it hundreds of times before this accident (R. 136).

Defendant's conductor testified that switchmen and other employees crossed and recrossed the tracks where plaintiff was hurt right along and that he knew men were apt to be passing there at any time (R. 216). He said that "there was no light in this caboose until after this accident" (R. 217), and that the crew in making this move with the cabooses "generally shove them in or kicked them in and have a man ride them in" (R. 218), but claimed that the man usually rode the south end of the caboose rather than the north end as they moved

north. He testified that in making up trains the cars were shoved in from the north end of the yard (R. 219), that being several blocks north of the place where the accident occurred.

Defendant's witness Banning testified that it was the custom and practice in making the movement in question for a man to ride the car or caboose in onto the switch track (R. 159); that at a place where it was known that dozens of employees crossed the tracks at all hours of the day and night it was the custom and practice to have a man on "the hind end looking out" (R. 160).

Another switchman called by defendant testified that he had made similar switching movements with cabooses at the place in question and that the employees of the defendant crossed the tracks there at the place of the accident right along (R. 242); that in switching these cabooses in as they were doing when Rock was hurt, they kept a lookout on them where these men crossed and re-crossed, from the depot over to the oil house and the eating house (R. 247).

Two witnesses called by the plaintiff testified that they had assisted in making similar switching movements with cabooses over this same track and that in shoving in over the lead track where the accident happened it was the custom and practice for a man to be on the leading car with a light (R. 60, 69). These same witnesses also testified that it was a general custom and practice to dim the headlight on locomotive engines entering and moving through the yard (R. 59, 68). The defendant does not contend that this was not the general custom and practice as to the locomotive headlights.

Plaintiff testified that the headlight on the locomotive pulling this train in front of which he crossed just before being hit by the cabooses that were started up and moved

north on the next track, was not dimmed and that its rays prevented him from seeing these cabooses as they started from a standing position twenty to thirty-five feet away from the point where they struck him (R. 24). He is in effect corroborated by the fireman on the transfer train, who testified that as he rode north upon this north-bound engine in front of which plaintiff crossed, he saw the plaintiff about one hundred and fifty feet west of the track on which his train was running (R. 145). He further testified that it was a dark night and when asked how he could see plaintiff that distance west of the track he said that "a bright light would light it up as clear as day" (R. 145). There were no artificial lights near these tracks (R. 31) and the only bright light that could have enabled him to see the plaintiff was the bright headlight on the locomotive engine upon which he was riding and which plaintiff testified had not been dimmed.

With these facts in mind, did plaintiff assume the risk of injury as a matter of law or was that question properly submitted to the jury?

(A) The Law on the Question of Assumed Risk.

Much of the argument advanced by defendant confuses the doctrine of assumed risk with that of contributory negligence. If plaintiff, seeing this approaching train with the locomotive headlight undimmed, acted carelessly in crossing in front of it, such conduct on his part would amount to contributory negligence only and the assumed risk doctrine would not apply. He certainly was aware of the defendant's negligence in failing to dim the headlight, but he did not know and he was not called upon to anticipate that there would be a negligent movement of a locomotive with cabooses attached to it on the next track. He had no knowledge that the defendant would start and move these cabooses that had been stand-

ing there attached to a locomotive engine, without ringing the bell or without having a light upon the foremost caboose and a man riding it to give warning to employees who habitually crossed there at all hours of the day and night. The burden of proving that plaintiff *knew and appreciated* the danger to be incurred on the track upon which he was hit was upon the defendant under the governing decisions of this court in construing the Federal Employers' Liability Act.

This court has repeatedly held that before a plaintiff can be barred on the ground of assumed risk as a matter of law, the danger to him must have been so *imminent* and *immediately threatening* that no reasonably prudent man under the same circumstances and conditions would have confronted it. In *Seaboard Air Line* v. *Horton*, 239 U. S. 595, it appears that Horton was an engineer operating a locomotive used in interstate commerce. There was a defective guard glass on the water guage of this locomotive. He reported the defect and was told by his superior that it would be repaired as soon as a new glass could be obtained. Nevertheless, knowing that the guage might explode and injure him at any minute, he continued to run the engine for about one week when the guage did explode and injure him because of the absence of the guard glass. In the case at bar there is no such thing as a promise to repair but in affirming a judgment in favor of Horton the rule applicable in assumed risk defenses was announced, the court saying that "The danger must be imminent—immediately threatening—so as to render it clearly imprudent for him to confront it, even in the light of duty, pending the promise."

In the case at bar can it be said as a matter of law that the danger to plaintiff in crossing these tracks as he did was so *imminent* and so *immediately threaten-*

ing that a reasonably prudent man would have remained away from his work and his crew awaiting him while a train of eighty cars moving at three miles per hour passed him? Figuring the average length of a car as forty to forty-five feet (R. 229), this approaching train of eighty cars was over a half mile long. All the witnesses agree that it was moving from three to five miles an hour. It would have taken over a half hour for this train to have passed. Plaintiff's twenty minute lunch period was about up and it cannot reasonably be said that he failed to do what an ordinarily prudent employee would have done in crossing in front of this oncoming train with the undimmed locomotive headlight which did not endanger him and which would have delayed him a half hour if he had waited for it to pass. He had no reason to believe that there was a locomotive engine with cabooses coupled to it standing on the next track that would start up without signal or bell and without a light or a lookout upon the foremost one. They offered no danger while standing there and if the bell on the engine that shoved them north had sounded or any lookout at all had been kept, as plaintiff had a right to assume would be done in accordance with the usual custom and practice as shown by the evidence, the accident would have undoubtedly been avoided.

In *Chesapeake & Ohio Railroad Company* v. *De Atley*, 241 U. S. 310, the plaintiff in the line of his duty was required to board a moving train, and defendant's engine men knew that he was obliged to get aboard as it passed him. On appeal in this court the Railroad Company contended that he assumed the risk of injury in getting on the train and that if it was "moving slowly the risk is an ordinary one incident to the business of railroading; while if it is moving rapidly, the risk is

open, obvious and apparent." This court passing on the case said on page 317 of the opinion:

> "We are unable to concur in the view that there was no question for the jury. Whether the risk was an extraordinary risk depended upon whether the speed of the train was greater than plaintiff reasonably might have anticipated; and this rested upon the same considerations that were determinative of the question of the engineer's negligence. If the jury should find, as in fact they did find, that the speed of the train was unduly great, so that the risk of boarding the engine was an extraordinary risk, the question whether plaintiff assumed it then depended upon whether he was aware that the speed was excessive, and appreciated the extraordinary danger; or, if not, then upon whether the undue speed and the consequent danger to him were so obvious that an ordinarily prudent person in his situation would have realized and appreciated them. * * *."

In *Gila Valley, etc., Ry. Co.* v. *Hall*, 232 U. S. 94, the facts show that the plaintiff was injured by reason of a defective third wheel, or pony wheel on a three-wheeled railway gasoline car called a track velocipede. The defect in the flange of the pony wheel was in plain sight and because of it the car was derailed and the plaintiff injured. There was no promise to repair made by defendant or peremptory order to the plaintiff to use this car. In affirming a judgment for the plaintiff this court stated that a verdict "could not properly have been directed for defendant upon the ground that plaintiff, in using the car, had assumed an obvious risk * * *." In the course of the opinion it was said (page 100):

> "Moreover, in order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence it must appear not only that he knew (or is presumed to have known)

of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person, under the circumstances would have appreciated it."

Further in the course of the opinion it appears that the defendant had asked the trial court to give an instruction to the effect that it was the duty of the plaintiff to exercise ordinary care to have discovered this defect, and that if he had not done so he should be held to have assumed the risk. The Supreme Court said that the instruction asked was properly refused and that the one given in which it was said that,

> "*The true test is not in the exercise of ordinary care to discover dangers, by the employee, but whether the defect is known or plainly observable by him.* An employee is not charged by law with the assumption of a risk arising out of defective appliances provided by his employer, unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incident to the use of such appliances,"

was a correct statement of law.

In *Central Railroad Company of New Jersey* v. *Colasurdo*, 192 Fed. 901 (dismissed by plaintiff, 226 U. S. 617), the evidence showed that the plaintiff was at work in the night time repairing a switch in defendant's terminal yards, and that he was injured when struck by certain unlighted cars, as they were kicked back along the track without warning. In affirming judgment for plaintiff, the court refused to hold that although plaintiff knew cars might be moved over this track, he assumed the risk of such movement being made without warning. The court said:

> "We cannot believe that the risk of being injured in this manner, while engaged in discharging

his duty, was assumed by the plaintiff. He assumed the usual and ordinary risks of the calling, but when ordered to repair a track at night he had a right to assume that some precaution would be taken to guard him against extraordinary danger. If a watchman were not stationed to warn him of the approach of trains, he at least had a right to expect that a train would not back down upon him with no notice of its approach and no attempt to apply the brakes until only eight feet distant."

The Supreme Court of Nebraska, in *Engel* v. *C. B. & Q. R. R. Co.*, 111 Neb. 21, 195 N. W. 523, following the rule announced in *Chesapeake & Ohio Railroad Co.* v. *DeAtley*, 241 U. S. 310, affirmed a judgment in favor of the administratrix of a deceased railroad employee under facts very similar to those in the case at bar. Plaintiff's intestate was employed as a brakeman in the defendant's yards, and was while so employed, struck by a locomotive engine backed along one of the tracks. The court found from the evidence that the defendant and its employees on the locomotive "knew that deceased and the gang of men under him were constantly crossing and re-crossing the tracks at the place where the accident occurred, and that locomotives were traveling backward and forward on the many tracks in the yard; and that the deceased in doing such work, knew that the tracks were a place of danger at all times." As in the case at bar, no warning of the approach of the engine was given, and no one on it saw the plaintiff. The court in affirming the judgment, said (Opin. 32):

"It cannot be successfully contended that deceased assumed by his employment any injuries which were liable to result from the negligence and carelessness of defendant or its employees. The employee's assumption of risk only applies to the dangers incident to and arising out of the condi-

tions of the machinery, premises and his employment. It was the duty of deceased to watch for dangers and protect himself against them, if possible, and to exercise great vigilance in looking out for approaching engines and trains, but it was also the duty of the railroad company and its employees to use due care and caution for the safety of the employees; and where a railroad company knows that its employees are engaged in work on or about its tracks, it is its plain duty to maintain a careful lookout for such employees to prevent injuring them. Because the deceased had been employed by the railroad company for 22 years, a part of which time as foreman of a gang of men, and was aware of the many dangers incident to such employment, these facts did not authorize the railroad company to operate its engine and tender negligently and without regard to his safety or without using the ordinary care which an individual is obliged to use, under like circumstances, for the protection of his employees. The deceased had a right to presume that those operating the locomotive would use proper care and caution for his safety, that they would maintain a careful lookout to prevent injuring him, and that they would take the resonable, ordinary and usual precautions necessary to protect him in his employment. It cannot be claimed that under the Federal Employers' Liability Act an employee assumes the risks of the negligence of the employer or of the employer's employees or agents, at least until knowledge of the particular negligence which caused or was liable to cause the injury is brought to his attention."

The case of *Indiana, Illinois & Iowa R. R. Co.* v. *Olstat*, 212 Ill. 429, was decided prior to the enactment of the Federal Employers' Liability Act. Plaintiff was injured when struck by a locomotive backing along a track, without warning, as he was at work in the repair of this track. Defendant claimed there was no evidence

of its negligence, and that the plaintiff was guilty of contributory negligence, and had assumed the risk of injury from moving trains and engines. Plaintiff knew that the engineer in charge of this particular engine had frequently moved engines along the tracks there without sounding the whistle or ringing the bell, and defendant claimed that, knowing of this negligence on the part of the engineer, plaintiff assumed the risk of injury by reason of it. In affirming judgment for plaintiff, the court said (Opin. 434):

> "While appellee knew that Mumaw moved the engine through the yards with bell and whistle both silent, we do not think it can be said, *as a matter of law*, that he thereby assumed the risk that Mumaw would deliberately start an engine and run it upon men who he knew were working on the track at a point not more than two hundred feet from the starting place of the engine, without giving them any warning whatever."

Many other cases might be cited to the same effect, and the rule is so reasonable that we deem it unnecessary to quote from other authorities. How then, can it be said that the plaintiff, in the instant case, assumed the risk of this caboose movement when the locomotive engine attached to those cabooses started up from a position, according to defendant's conductor, Hudson, not over thirty-five feet away from where plaintiff was crossing, without sounding any warning or giving any signal of its approach, when plaintiff did not know or have a reason to believe such a negligent movement was about to be made? He could not assume the risk of defendant's negligence until he *knew* of that negligence, and *appreciated* the dangers arising by reason of it.

Defendant refers to the case of *Toledo, St. Louis & Western Railroad Co. v. Allen*, decided by this court on

February 20, 1928 (48 S. C. R. 215). In that case plaintiff was injured while at work as a car checker in a switching yard where trains were continually being made up and broken up. While checking cars down on one of a number of tracks over which cars were being continually shunted, he was struck by two cars moving by force of gravity without a rider and without any warning light upon them. There was no evidence of a custom and practice in that yard for the defendant to have a man upon cars so moved or a light upon them. There was no evidence of plaintiff crossing the tracks upon a much used and traveled way, as in the case at bar. The facts are so far different from the facts in the instant case that the decision is inapplicable.

(B) Defendant Was Negligent.

Having in mind the evidence heretofore reviewed, was defendant negligent in operating the locomotive engine that pulled the incoming freight train, in front of which plaintiff crossed, without dimming the bright headlight upon it as it came into the yard? Was defendant, in starting a caboose train on the next adjacent track without signal of any kind or without having a light at its foremost end or a man to keep a lookout and control its movements at a place where dozens of men crossed the tracks at all hours of the day and night, guilty of negligence? This was not in a switch yard where cars were continually shunted in on to switch tracks in making up or breaking up trains. There were two main line tracks and two lead tracks at the place where plaintiff crossed. He was injured, according to the scale of the diagram in evidence marked as Defendant's Exhibit I (R. 78), about one hundred to one hundred and twenty-five feet north of Irving Park boulevard where all of the witnesses testified employees crossed and re-crossed

at all hours of the day and night. Under the circumstances defendant owed a duty to give warning by signal of some kind of approaching caboose trains and to keep a lookout for these men, including plaintiff. The evidence heretofore reviewed showed specifically that it was the custom and practice to give such warning and to keep a man with a light on the foremost car or caboose moving along the track at that place.

In *Bombolis* v. *Minneapolis & St. L. R. Co.*, 128 Minn. 112, 150 N. W. 385 (affirmed 241 U. S. 211), it appears that plaintiff's intestate sustained fatal injuries while at work repairing a track. A freight train signaled its approach on one of the tracks and plaintiff's intestate stepped back near to another track, and was struck by a switch engine that approached without warning of any kind, according to plaintiff's evidence. Judgment for plaintiff was affirmed, the salient points applicable to the case at bar being stated as follows:

> "The negligence alleged and relied on is the failure of the switch engine crew to give the men working between the tracks a warning of its approach. No such warning was in fact given, or at least the jury was abundantly justified in so finding. There was testimony by at least four witnesses that it was the custom to give warning of the approach of a switch engine whenever there were men working on the track. *We think that the question whether the engineer of the switch engine was negligent in not ringing his bell as he approached these men was for the jury, and that the evidence sustains the verdict on this issue.* It is urged that the engineer ought not to have anticipated that the men working on the main track would take a position on or so near the lead track as to be in danger from the switch engine. But their work required them to be between the main track and the lead, the freight train was approaching on the main track, and the men

were getting out of its way. It is not going very far or imposing a very onerous duty to hold that the engineer should have rung the bell."

In *Philadelphia B. & W. R. Co.* v. *Tucker*, 35 App. D. C. 123 (affirmed without opinion 220 U. S. 608) it appears that plaintiff's intestate was fatally injured when struck by a train while crossing defendant's tracks along a pathway which had long been used by employees going to and from work. He was aware of the fact that trains and cars might move along these tracks at any time. In affirming a judgment in favor of plaintiff the court held that whether the defendant had provided a safe "*way*" for its employees was for the jury and that the long continued practice of employees in using this pathway over the tracks "was with the knowledge and consent of the defendant."

Under the Federal Employers' Liability Act upon which the instant suit is based the defendant is liable for any "defect or insufficiency" in its "ways" due to its negligence, and the pathway used by the plaintiff at the time he was injured was clearly a "way" within the meaning of the Federal Act.

In *Frazier* v. *Interstate Railroad Company*, 264 Fed. 96, the United States Court of Appeals, Fourth Circuit, passed upon a case where defendant's employee was killed while at work as a switchman in interstate commerce in defendant's yard. The accident happened in the night time, when, after making a coupling between two cars on a certain track, he stepped back upon an adjacent track and was struck by an engine with a freight car in front of it, which came upon him without warning, and without a light upon the car. The Circuit Court of Appeals said (Opin. 98):

"Both authority and reason are against the proposition that the crew of a switch train, or any other train, can be judicially declared as a matter of law to be without fault in running along an adjacent track under such conditions as here appear, without showing a light or sounding a bell or whistle or having a lookout. Upon proof of the allegations of the declaration, it will be for the jury to say whether the proximate cause of the casualty was solely negligence of the defendant, or of the plaintiff, or the two combined, or inevitable accident. Among the cases sustaining this conclusion we cite: *Norfolk & Western Ry.* v. *Earnest*, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172; *Chicago, Rock Island Ry.* v. *Wright*, 239 U. S. 548, 36 Sup. Ct. 185, 60 L. Ed. 431; *Erie R. R. Co.* v. *Purucker*, 244 U. S. 320, 37 Sup. Ct. 629, 61 L. Ed. 1166; *Toledo, St. L. & W. R. Co. et al.* v. *Bartley*, 172 Fed. 82, 96 C. C. A. 570; *Southern Ry. Co.* v. *Smith*, 205 Fed. 360, 123 C. C. A. 488; *Southern Ry. Co.* v. *Darnell's Admx.*, 114 Va. 312, 76 S. E. 291; *Harwick* v. *Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328. Reversed."

In *Delaware L. & W. R. Co.* v. *Hughes*, 240 Fed. 941, the United States Circuit Court of Appeals, Second Circuit, affirmed a judgment in favor of the administratrix of a deceased railroad switchman who was injured while at work as a switchman in defendant's yards. Plaintiff's intestate had had 25 years' experience as a switchman in the yard where he sustained his fatal injury and was thoroughly acquainted with the premises. He was hit by a moving car which plaintiff's evidence showed was "improperly managed in that there was no watchman at or near to its end with a signal lantern to warn those who had a right to be on the track of an approaching car." In holding the defendant negligent the court said that although the accident happened in the yard limits, "it was the duty of the defendant to give adequate warning

FILED
MAR 2 1929
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 454.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Petitioner,

vs.

JOHN ROCK,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND/OR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR RESPONDENT.

HERBERT H. PATTERSON,
Counsel for Respondent.

CHAMPLIN LAW PRINTING COMPANY, CHICAGO

(33,763)

INDEX.

SUBJECT INDEX OF ARGUMENT.

	PAGE
The court is without jurisdiction	1
The relation of master and servant existed within the meaning of the Federal Employers' Liability Act	7
The evidence as to defendant's negligence	18
The law as to defendant's negligence	27
Defendant was negligent in failing to dim the locomotive headlight	36
The evidence on the question of assumed risk and the law applicable thereto	38
Cases relied upon by defendant distinguished	45
Weight to be given concurring opinions of trial and Appellate Courts	47

TABLE OF CASES AND AUTHORITIES.

	PAGE
American Car and Foundry Co. v. Armentraut, 214 Ill. 509	13
Baker v. Beattie, 222 S. W. 658	12
Baltimore & O. R. R. Co. v. Whitacre, 242 U. S. 169	49
Bombolis v. Minneapolis & S. T. L. R. Co., 128 Minn. 112, 150 S. W. 385	30
Central R. R. Co. of N. J. v. Colasurdo, 192 Fed. 901	41
Chesapeake & O. R. R. Co. v. DeAtley, 241 U. S. 310, 317	40
Cincinnati, etc., R. R. Co. v. Mayfield's Admr., 145 Ky. 305, 140 S. W. 310	32
Delaware, L. & W. R. Co. v. Hughes, 240 Fed. 941	35

to the Supreme Courts, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such cases grant appeals to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in said Appellate Courts it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court: * * *"

The complete record in this case discloses that no certificate of importance was ever asked for or denied in the Appellate Court of Illinois. That court had before it the entire record of the proceedings, and it might have granted a certificate of importance, in which event the Supreme Court of Illinois would have taken the case and passed judgment upon it. The defendant did, however, petition the Supreme Court of Illinois for a writ of certiorari. The petition was denied, and the court never took the case for review and determination. Petitioner, therefore, did not, in accordance with Volume 43, Section 237, Par. I, United States Statutes at Large, page 937, exhaust in the state courts the means at hand for obtaining "a final judgment or decree * * * in the highest court * * * in which a decision in the suit could be had. * * *"

In *Fisher* v. *Perkins*, 122 U. S. 522, under like circumstances, it was held:

> "The want of a certificate is good reason for refusing to allow an appeal, but until it has been asked for and refused, its absence furnishes no ground for a writ of error from this court."
>
> "As it is, we find nothing in the record to show that the suit could not have been taken to the Court of Appeals if the necessary application had been made, and, consequently, we have no right to proceed. * * * The judgment is still the judgment of the Superior Court, which is not the highest court of the state, and it might have been taken to the Court of Appeals for review if the grant of an appeal had been applied for and secured."

Although the defendant took one and not the other of two courses open to it and filed its petition for writ of certiorari in the Supreme Court of Illinois, still the judgment against it might have been taken to the Supreme Court of Illinois for review if the Appellate Court of Illinois had been asked to and had granted a certificate of importance. Everything was not done that could be done to take the case to the highest court of the State of Illinois.

Gregory v. *McVeigh*, 23 Wall, 294.

Stratton v. *Stratton*, 239 U. S. 55.

The denial of petitioner's petition for writ of certiorari by the highest court of the State of Illinois is not such a judgment of such court as may be reviewed by the Supreme Court of the United States by writ of certiorari, since petitioner failed to make application to the Appellate Court for a certificate of importance which, if granted, entitled petitioner to an appeal to the Supreme Court of Illinois "as a matter of right."

McMaster, et al. v. *Gould, et al.*, 276 U. S. 284.

Matthews v. *Hume*, 269 U. S. 262.

In considering the *McMaster* case (276 U. S. 284), in its applicability to the case at bar it will be observed that the Supreme Court of New York corresponds in function to the Circuit Court of Illinois in which the judgment under consideration was entered. The Appellate Division of the Supreme Court of New York corresponds to the Appellate Court of Illinois, while the Court of Appeals of New York corresponds to the Supreme Court of Illinois. Section 588 of the New York Civil Practice Act directs the manner in which an appeal may be taken and a case reviewed by the highest court of that state, the Court of Appeals. In certain cases an appeal from the Appellate Division may be taken as a matter of right to the Court of Appeals. In other cases where this cannot be done as a matter of right, a litigant may ask the Appellate Division to certify to the Court of Appeals that a question of law is involved which ought to be reviewed by the Court of Appeals. This proceeding is akin to the certificate of importance provided for by the statute of Illinois, hereinbefore quoted. (Cahill's Rev. Stat., Sec. 120, Chap. 110.) If the Appellate Division refuses to certify the case to the Court of Appeals, the New York Practice Act further provides that then a motion or petition may be addressed to the Court of Appeals asking that court to take the case for review. This proceeding is akin to the petition for certiorari in the Supreme Court of Illinois.

In the *McMaster* case (276 U. S. 284) the petitioners moved the Appellate Division "for leave to appeal to the Court of Appeals." This motion was denied. The petitioners then took an appeal without leave and this was dismissed by the Court of Appeals without opinion. At no time did the petitioner apply to the Court of Appeals for leave to appeal to that court. This court held that it was without authority to review the judgment and the writ was

dismissed for want of jurisdiction, your Honors holding that the case was not one in which an appeal lay as a matter of right under the New York Practice Act and that, "to obtain such a discretionary appeal application may be made to the Appellate Division for leave to appeal, and, in case of refusal, to the Court of Appeals"; and further that "since the petitioners, when the Appellate Division refused them leave to appeal, did not make an application to the Court of Appeals for such leave, the judgment is not that of the highest court of the state in which a decision could be had."

In *Matthews* v. *Huce*, 269 U. S. 262, an appeal was taken from the trial court—Court of Common Pleas—of Ohio to the Court of Appeals which affirmed the decrees of the Common Pleas Court. Appeals as of right were then prosecuted to the Supreme Court of the state based on the ground that constitutional questions were presented. The Ohio Supreme Court held that the record showed that the proceeding in the Ohio Supreme Court was filed as of right and that it presented no debatable constitutional question and that the petition should, therefore, be dismissed. Writs of error were then applied for and allowed not to the Supreme Court of Ohio but to the Court of Appeals. Motions were made in the Supreme Court of the United States to dismiss the writs. Under the Ohio practice after the petitions for writs of error as of right were denied, the litigant had the right to apply to the Supreme Court of Ohio for a writ of certiorari to bring the case to that court for its consideration. No such application was made. To deny or grant a writ of certiorari was, under the Ohio practice, discretionary. This court in dismissing the writs of error held:

> "The plaintiffs in error are thus in a dilemma from which they cannot escape. If the supreme court by

> final decree disposed of the constitutional questions on the merits by dismissal of the petition, then the writ of error lay to the supreme court. If it did not, then the decree of the court of appeals did not become that of the highest court to which a writ of error would lie from this court for lack of application for certiorari."

The fact that under the Illinois practice, petitioner had the right to and did apply for a writ of certiorari to the Supreme Court of Illinois without applying for a certificate of importance in the Appellate Court does not alter the situation, since the refusal of the Supreme Court to grant such writ was discretionary with that court. While the limit of time for making application in this court for petition for certiorari runs from the date when certiorari was denied by the Supreme Court of Illinois (*American Ry. Express Co.* v. *Levee*, 263 U. S. 19, 20), nevertheless that court never took the case for review or determination or passed upon its merits. Obviously petitioner, in the instant case, did not exhaust all the remedies or means at hand for obtaining a final judgment or decree by the highest court of the State of Illinois.

The effect of the denial of a petition for writ of certiorari has often been declared by the Supreme Court of the United States. In the case of *U. S.* v. *Carver*, 260 U. S. 482, it is said:

> "The denial of a writ of certiorari imports no expression of opinion on the merits of the case."

We submit that the ruling in the *McMaster* case (276 U. S. 284), *supra*, is decisive of this case, as no final judgment or decree "was ever entered in the highest court" of the State of Illinois. Such judgment might have been obtained if petitioner had applied for and been granted a certificate of importance in the Appellate Court of Illinois.

The Appellate Courts of Illinois frequently grant certificates of importance upon application therefor. In *Wilcox, Admr.* v. *Bierd, et al., Receivers, etc.*, 330 Ill. 571, 575, a certificate of importance was granted by the Appellate Court in a case in which that court affirmed a judgment of the trial court entered on sustaining defendant's demurrer to a declaration in a case brought to recover damages for wrongful death. In *Reivitz* v. *Chicago Rapid Transit Co.*, 327 Ill. 207, a certificate of importance was granted by the Appellate Court after it had affirmed a judgment for $1,500 as damages for personal injuries sustained by Reivitz. In *Rubin* v. *Strandberg*, 288 Ill. 64, the Supreme Court of Illinois reviewed a case involving contract rights after a certificate of importance was granted by the Appellate Court. In *Sherwin* v. *City of Aurora*, 257 Ill. 458, the Supreme Court of Illinois was required to review a judgment of $2,500 rendered in favor of the plaintiff in a personal injury suit, the Appellate Court having granted the defendant's petition for a certificate of importance presented by defendant in that court.

II.

The relation of master and servant existed between plaintiff and defendant within the meaning of the Federal Employers' Liability Act.

In direct examination the plaintiff told all of the circumstances in connection with the obtaining of his employment. In 1912 and in 1917 he underwent abdominal operations. He also had a rupture (R. 17). He gave the railroad company his own references but had another man take the required physical examination. It would be thirty to sixty days from the time he applied for work before he would know definitely whether he was to remain as a switchman and he worked during that period and for fourteen months all together prior to the accident (R. 18). He did regu-

lar switchman's work (R. 19), and there is no word anywhere in the record that his physical condition in any way handicapped him or interfered with his work. In fact there is positive testimony to the contrary (R. 51). When plaintiff was not marked up on the board for work on certain days when there was no work for him, he did other work handling sewer tiling (R. 52). After being rejected by the company's doctors the first time, he applied for work with the same yardmaster that had sent him to the superintendent the first time. He told him he had been rejected as Joe Rock and gave him a slip on which the yardmaster put his name as John Rock—J. J. Rock (R. 92)—and told him to again go to the yard men's office and make this second application, after which he had another man take the physical examination (R. 53, 55). The same day he went to work under the supervision of this same yardmaster and continued under his supervision for fourteen months up until the time he was injured (R. 56). He was known only as Joe Rock while at work there (R. 93).

The defendant's doctor told the plaintiff when he first applied for work, that he had "a light rupture." From the record but one conclusion can be reached and that is that the plaintiff was physically able and competent to do the work that he was employed to do and that he did do it for over a year without any complaint or criticism of any kind. *Defendant concedes and the Appellate Court of Illinois specifically found that the physical condition of the plaintiff in no way contributed to bring about his accident.* Under such circumstances did the plaintiff's failure to comply with the rule requiring him successfully to pass a physical examination before going to work, take away his rights as an employee during the fourteen months of his employment?

It is a matter of common knowledge that under the necessity of obtaining work for the support of themselves and

families, men frequently misrepresent and misstate facts in order to obtain employment. Many industries, particularly railroads, will not employ men under a certain age or over a certain age and hundreds of men seeking such employment with full knowledge that employment will not be obtained if they give their correct age, deliberately misstate the facts. It is also a matter of common knowledge that railroad companies ordinarily will not employ men who have been discharged by other railroad companies or who have brought lawsuits against other railroad companies. Many mercantile establishments will not employ persons unless they have had experience in doing the work in question. The applicant, knowing this, deliberately misstates his qualifications for the work in order to obtain the employment. These practices are mere inducements to the contract of employment and such persons are employees in legal contemplation after they have been put to work and their services have been accepted and paid for by the employer.

The case of *Payne, Director General* v. *Daughtery*, 283 Fed. 353, decided by the Circuit Court of Appeals for the Eighth Circuit, is absolutely in point. It was a suit brought to recover damages for personal injuries sustained by a railroad switchman while at work in interstate commerce. The defendant admitted that the car on which plaintiff was at work when injured was defectively equipped and that it was being moved in interstate transportation, but denied that plaintiff was its employee, because proof showed that the plaintiff "*obtained his position by fraudulent misrepresentations of his former employment and concealing prior injuries, that he was a victim of epilepsy to which his fall was attributed in whole or in part* • • •." In affirming judgment for the plaintiff the court said (Opin. 354):

"(1) A principal contention, embraces in a number of assignments, is that the trial court erred in excluding evidence offered to defeat the action, on the ground that the plaintiff fraudulently secured his employment, as pleaded, and in refusing instructions tendering such defense. In our opinion, the rulings were correct. The complaint is not that proof is incompetent which tended to attribute the fall from the car to prior injury or affliction. That is far different from permitting a retroactive dissolution of the relation of master and servant, by virtue of the contract, which, even if voidable, was, while it subsisted, attended with the duty, required by law, for the safety of the latter. Cases are cited involving different facts, but of contrary import in principle. We regard the decisions such as *Lupher* v. *Atchison, T. & S. F. Ry. Co.*, 81 Kan. 585, 106 Pac. 284, 25 L. R. A. (N. S.) 707, as declaring the sound and just rule, namely, that there is liability to the employee, notwithstanding the inducement to the contract. Furthermore, this action was brought under the Federal Employers' Liability Law (35 Stat. 65, Comp. St., Secs. 8657-8665) and the fault of the defendant was alleged under the Safety Appliance Acts (27 Stat. 531; 32 Stat. 943, Comp. St., Secs. 8605-8615). And in our opinion we should hold that the defense urged was not available, in view of the positive terms of sections 1 and 5 of the former act. See *Phila., Balt. & Wash. R. R.* v. *Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911; *Chicago & Alton R. Co.* v. *Wagner*, 239 U. S. 452, 36 Sup. Ct. 135, 60 L. ed. 379; *Spokane & Inland R. R.* v. *Campbell*, 241 U. S. 497, 36 Sup. Ct. 683, 60 L. ed. 1125."

In the Kansas case cited in the above decision (*Lupher* v. *Atchison, T. & S. F. Ry.*, 81 Kan. 585, 106 Pac. 284) plaintiff obtained his position by misrepresenting his age. A rule of the company forbade the employment of minors as brakeman and plaintiff, eighteen years of age, knew that, and that he could not obtain employment unless the

defendant believed he was twenty-one. After working several months he was injured and brought suit to recover damages therefor. The trial court directed a verdict for defendant "upon the ground that his misrepresentations in securing his employment prevented the establishment of the relation of master and servant, and that at the time of his injury he was either a trespasser or at most a mere licensee to whom the company owed no other duty than not to injure him wrongfully or wantonly." The Supreme Court of Kansas reversed this ruling of the trial court and in so doing said:

> "* * * the seeker of employment does, it is true, procure his contract by false representations, but having obtained it, he begins the performance of service for the benefit of the company, and renders it an equivalent for all that he receives from it. True, the company could at its option, upon discovery of the deceit, discharge him at any moment (26 Cyc. Law & Proc., p. 989), but even then he would be entitled to compensation for the time he had served, not necessarily at the agreed rate, but according to the reasonable value of his services. *Austee v. Ober*, 26 Mo. App. 665. The relation of master and servant exists in virtue of the one party performing valuable services which are accepted and paid for by the other. If Lupher had arrived at full age before the accident occurred, it would hardly be contended that he was still a trespasser. Yet he would still have been working for the company under a contract he had obtained by misrepresentation. The difference would be that his arrival at majority would have rendered it absolutely impossible that any injury should result to the company from the deception."

On a similar proposition the court in *Lake Shore & M. S. R. Co. v. Baldwin*, 19 Ohio C. C. 338, said (Opin. 341):

> "A large number of cases have been cited where it was held that persons wrongfully upon trains were

trespassers, and not entitled to the protection of the railroad company, and learned counsel for the railroad company insist with great vigor and earnestness that, under the state of facts in this case, Baldwin was a trespasser and wrongdoer; that he procured his employment in the service of the railroad company by false pretense; that he was wrongfully upon the train where he was injured; that, being a wrongdoer and trespasser, the company owed him no duty to provide a safe place for him to work and safe appliances and machinery to do his work. * * * The rule of the Railroad company requiring its employees to be twenty one years of age is a reasonable one, but we cannot agree with counsel that the false statement of Glenn Baldwin as to his age made him a trespasser upon the cars and tracks of the railroad company. * * * putting it as strongly as counsel for the company can put it, that he falsely represented his age to the company, and colluded and connived with George Davis to deceive the company, we still think that, while he was in the actual service of the railroad company, he was entitled to the protection of an employee. The fact that he had misrepresented his age, and the further fact that he was a minor, did not make the contract for service void, but voidable. The railroad company, having been deceived, on the other hand, could terminate it whenever it discovered the deception; but, until one party or the other put an end to the relations, the contract continued to exist."

In *Baker* v. *Beattie*, 222 S. W. 638, the Texas Court of Civil Appeals held that the fact that an injured switchman had made false statements in his application for employment as to his age and as to prior injuries he had sustained did not make void his contract of employment so as to destroy the relation of master and servant.

In *Matlock* v. *Williamsville, etc., Ry. Co.*, 198 Mo. 495, 95 S. W. 849, the same ruling was made under similar facts.

In *Denver & R. G. R. Co.* v. *Reiter*, 47 Colo. 417, 107 Pac. 1100, it was held that although a railroad brakeman had deliberately made fraudulent representations as to his age in order to obtain the employment at which he was at work when injured, nevertheless, "the law is well settled" that the plaintiff by such misrepresentations, believed and relied upon by the employer, was not "thereby barred from a recovery for injuries which he may suffer from the negligence of his employer * * *."

The courts of Illinois have repeatedly held that although a minor misrepresents his age in order to obtain employment, such misrepresentation is not a bar to an action brought to recover damages for injury sustained while such minor is at work under a contract of employment so obtained. It was so held in *American Car & Foundry Company* v. *Armentraut*, 214 Ill. 509.

In *Galveston, H. & S. A. Ry. Co.* v. *Harris*, 107 S. W. 108, 48 Tex. Civ. App. 434, plaintiff recovered judgment as damages for personal injuries sustained by him while at work as a brakeman. His application for employment was in writing and sworn to by him. In it he stated that he had never had any litigation with any railroad company. He was given employment and later sustained the injuries upon which the suit was based. At the time of the trial it appeared that he had had other personal injuries while employed by other railroad companies and that he had brought suit against those companies to recover damages for such injuries. In asking a reversal of the judgment the railway company contended that Harris had practiced a fraud upon it in procuring his employment and that the defendant did not owe to him any duty by virtue of the employer and employee relation. It was admitted, as in the case at bar, that the falsity of the answers made by Harris in his application for employment in no way con-

tributed to his accident or to his injury. Judgment in his favor was affirmed, the court saying that plaintiff's,

> "falsehood did not of itself destroy the contract of employment and exempt appellant from any liability for its negligence toward him. It may have formed a just reason for the rescission of the contract of employment, but did not render his employment null and void. The relation of master and servant was established, and could not be rendered invalid in order to shield the master from the consequences of its negligence."

A similar holding was made in the case of *Kansas City M. & O. Ry. Co.* v. *Estes*, 203 S. W. 1155.

The Court of Appeals of New York in *Hart* v. *New York Central and H. R. R. Co.*, 205 N. Y. 317, 98 N. E. 493, passed on a judgment in a suit brought to recover for the death of a railroad fireman who had misrepresented his age at the time he contracted with the defendant for his employment, and there held:

> "The trial court committed no error in excluding the evidence, as constituting no defense. The misrepresentation of the deceased affected the contract of employment, in the sense that it made it voidable; but it did not affect the relation of master and servant, with respect to the former's obligation under the statute respecting the safety of the persons serving it. Notwithstanding that the deceased, by his misrepresentation, evaded the rule of the defendant forbidding the employment of minors, he was actually in its service, and therefore was entitled to the protection of an employe accorded by the law. See *L. S. & M. S. Ry. Co.* v. *Baldwin*, 19 Ohio Cir. Ct. R. 338; *Lupher* v. *Ry. Co.*, 81 Kan. 586, 106 Pac. 284, 25 L. R. A. (N. S.) 707."

An employee who made false statements in writing in order to obtain employment, even though his act in so

doing amounted to a misdemeanor under the New York statutes, was, nevertheless, entitled to receive compensation under the Workmen's Compensation Act of that state. The defense was that no contract of employment existed because of the deceit practiced. The court held that the contract of employment was not void but merely voidable. *Kenny* v. *Union Ry. Co.*, 106 App. Div. (N. Y.) 497.

Defendant cites *Stafford* v. *B. & O. R. R. Co.*, 262 Fed. 807, and a Virginia case,—*Norfolk & Western Ry. Co.* v. *Bondurant*, 107 Va. 515. The *Stafford* case was not decided by a reviewing court, but by a district judge on the plaintiff's motion to strike out defendant's special plea setting up the fact that Stafford had secured his employment much as plaintiff did in the case at bar. Plaintiff by this motion contended that the matters set up in the plea had no proper place in determining his rights. The trial court overruled the motion to strike, saying that "a number of questions, such as consent to the substitution (i. e., having someone else take the required physical examination) for example, might arise on trial that could not be determined in advance on this motion to reject the plea." The trial court thought that defendant should be permitted to show all the facts connected with the manner in which plaintiff obtained his employment when the case was called for trial and for that reason allowed the plea to stand. The record of the case shows that a few months after this hearing on the motion to strike the plea, the case was dismissed by the plaintiff. This *Stafford* case did not, therefore, hold that the fraudulent act of Stafford in having a substitute take the physical examination necessary in order that he might obtain employment himself, prevent the relation of master and servant from existing between him and the defendant company at the time he was injured.

The case of *Norfolk & Western Ry. Co.* v. *Bondurant*, 107 Va. 515, does sustain the defendant's contention in the case at bar. If that case is studied it will be observed that it is based upon the decision in *Fitzmaurice* v. *N. Y., etc., R. R. Co.*, 192 Mass. 159, relied upon by defendant in the Appellate Court of Illinois. The facts in the *Fitzmaurice* case, so wholeheartedly adopted by the Supreme Court of Virginia, are in no way analogous to the facts in the *Bondurant* case, or to the facts in the case at bar. Fitzmaurice was a passenger on defendant's road and admitted making fraudulent statements in order to obtain a ticket which but for her fraud would not have been sold to her. The distinction between the *Bondurant* case and the *Fitzmaurice* case is well stated by the Supreme Court of Kansas in the case of *Lupher* v. *Atchison T. & S. Fe Ry. Co.*, 81 Kan. 585, as follows:

> "The substance of the Massachusetts case is that one who uses a railroad ticket obtained at a reduced rate by fraudulent representations is not a passenger in the sense of being entitled to protection as such, and stands in no better position than a mere trespasser. This is the general doctrine, to which there seems to be no dissent. 6 Cyc. Law & Proc. p. 538. The Virginia court took the view that, by parity of reasoning, one who obtains employment from a railway company by a false statement as to his age is prevented by his fraudulent act from becoming an employee. We think the two situations are obviously dissimilar. The analogy is not close enough to warrant the application of the same rule. Among other differences may be noted this: In the one instance a person desiring to be transported from one point to another fraudulently procures the railway company to render him that service, a service which is wholly for his benefit, and in which the company has no interest whatever. He obtains by false pretenses something of value to himself for which he renders no equivalent. In the other the

seeker of employment does, it is true, procure his contract by false representations, but, having obtained it, he begins the performance of service for the benefit of the company, and renders it an equivalent for all that he received from it."

Under the authorities above cited we submit that the relation of master and servant existed in the case at bar between the plaintiff and defendant and that plaintiff's status at the time he was injured was that of an employee under the provisions of the Federal Employers' Liability Act.

The authorities cited by the defendant to the effect that a contract is void where one party enters into it under a mistake as to the identity of the other party, are not applicable to the facts in the instant case. Defendant intended to employ the plaintiff and the plaintiff after the preliminaries incident to his application for employment, did go to work. True, as a part of the inducement to the contract, he did have another man take the physical examination in his stead. In legal contemplation this misrepresentation is the same as any other misrepresentation would have been. Misstatements as to his age, as to whether he had ever been employed by any other railroad company, as to whether he had ever been injured while employed by a railroad company, or as to whether or not he was afflicted with any physical trouble that would incapacitate him from work, are, we submit, in the same category, namely, merely misrepresentation as an inducement to the contract of employment. The authorities collected on pages 17 and 18 of defendant's brief merely hold that fraud in the execution of a contract renders it void *ab initio*. The examination by a physician was but one step towards securing the employment (R. 162) and the employment was not given and a contract of employment was not executed until plain-

tiff went to work. It is the rule that fraud in the inducement to a contract merely makes the contract voidable at the option of the one upon whom the fraud has been practiced.

In Vol. 6, Ruling Case Law, Sec. 52, page 635, this distinction, based upon many cases, is clearly pointed out, as follows:

> "Moreover it is sometimes stated, rather loosely, that fraud avoids all contracts. As a matter of fact, *a contract induced by fraud is not void but voidable* at the option of the party injured by the fraud. A contract entered into by fraud on one side, or mistake through negligence on the other, is not absolutely void. While in one sense it is not the contract of the latter at all, because of his non assent to its terms with knowledge of facts, he may add the element of assent at any time, actually or constructively. Such a transaction is not then, in a legal sense, absolutely void; it is only voidable."

III.

The evidence as to defendant's negligence.

It is elementary that questions of negligence, contributory negligence and assumed risk are for the jury, where from the evidence and from legitimate inferences to be drawn from it, reasonable minds might differ as to the conclusions to be reached. With this in mind what does the evidence show as to defendant's negligence?

The testimony of the plaintiff in the case at bar stands absolutely unimpeached. No statement given to the defendant or to anyone else discloses anything as to the way the accident occurred that would impeach or cast doubt upon the truth of his testimony when on the stand. The accident happened about 8:30 in the evening at a place where dozens of employees cross and recross defendant's

tracks just north of Irving Park boulevard. At this point there was a spur track, two main lead tracks and two main line tracks. Plaintiff and the other members of his crew had been working from 3:00 o'clock in the afternoon of the same day up at the north end of the yard switching cars and making up trains (R. 21). About 8:30 or 9:00 o'clock in the evening they came from the north end of the yard at Lawrence avenue down to a point near the depot just north of Irving Park boulevard where their engine was left standing while they had their lunch (R. 21). They had twenty minutes in which to eat and get back to work. Plaintiff went from the engine standing on the east side of the tracks across the tracks over to his mother-in-law's home, about 300 feet west of the tracks, to eat. He was there about fifteen minutes and on his way back he stopped at the oil house on the west side of the tracks, to fill his lantern (R. 23). After filling and lighting his lamp he started to go back to his engine on the west side of the tracks. His twenty minute lunch period was about up and when he got near to the most westerly tracks he saw a long freight at about Irving Park south of him. It was coming north about three miles per hour (R. 24). The headlight on this locomotive had not been dimmed, contrary to the custom and practice in the yard (R. 24). Plaintiff, seeing this long train coming, and knowing that his crew would be delayed unless he could get across ahead of it, started to do what any ordinarily prudent person would do under the same circumstances, namely, get back to his work, rather than stand idly by while a train of about eighty cars passed him (R. 31). The locomotive was so far away from him that he had ample time to cross in front of it. There was about fifteen feet of space between the track on which the freight train was approaching and the track next east of it. After crossing this track on which the train was

coming he looked both north and south, but could see nothing coming from either direction. As he looked to the south after crossing this first track the bright headlight on this locomotive blinded him so that he did not and could not see some cabooses coming on that track from the south until they were about ten feet away from him (R. 25).

There was no light upon the caboose that struck him and no man riding it as a lookout, and no warning of its approach was given by engine bell, whistle or otherwise (R. 25). He tried to get out of the way, but was knocked down and dragged a distance of thirty or forty feet (R. 25). The caboose that struck him was coupled to another one and was being shoved north by a locomotive to be put in onto a switch track farther north.

Defendant's witness, Hudson, the conductor of the crew moving the cabooses, was about seventy five feet north of where the cabooses stopped after Rock's leg had been crushed (R. 207). They were going to cut these cabooses off from the engine and tender and kick them in onto a switch track. Hudson testified positively that he saw plaintiff cross in front of the locomotive pulling the freight train and keep on going toward the track on which these cabooses were. At the time plaintiff was approaching the track on which the Belt transfer train was on, the cabooses were standing still about 125 feet north of Irving Park boulevard (R. 213), and although Hudson saw plaintiff crossing in front of the Belt transfer engine coming straight toward the track on which these cabooses stood, he, nevertheless signalled the engineer to shove the cabooses north and gave no signal at all of any kind except so to move them, from the time he saw Rock until he was hit (R. 214). He also testified that the engine and cabooses did not move over twenty feet before striking plaintiff (R. 215), and he did

not claim to have heard the engine bell or any other warning signal before the cabooses were moved from where they stood when he signalled for the movement.

This testimony of conductor Hudson relative to the manner in which the cabooses were operated, is clear proof of negligence, for he admitted that switching crews and other employees used that walk across there to go to the oil houses to fill their lanterns; that that happens right along; that he knew that men were apt to be passing there at any time (R. 216). If Hudson, seeing plaintiff crossing that track so as not to be delayed by the passing of the incoming freight train, had refrained from signalling the crew that was handling the cabooses to move even for a few seconds plaintiff would not have been injured. When he gave the signal to move the cabooses north, plaintiff was fifteen or twenty feet west of the track on which the Belt transfer was moving, and, although he was running east toward the track the cabooses were on, Hudson gave no signal to stop the cabooses until the plaintiff went behind the cabooses; that was right when he got on the track (R. 214).

In addition to this negligent act of Conductor Hudson, the defendant was clearly negligent in failing to ring the bell on the engine attached to these cabooses when it started in motion to shove them to the north and in failing to have a lookout or light upon the foremost caboose as it moved over this pathway where employees crossed at all hours. Under the general negligence count of the declaration this proof was admissible. The plaintiff testified specifically that there was no bell or signal from this locomotive or from these cabooses (R. 25). The defendant practically admits the truth of that testimony for no one of its witnesses testified to the contrary.

Plaintiff's witness, Lippman, had worked in that yard as a switchman for almost seven years (R. 59). He testified that in shoving cars and cabooses over the lead track where this accident happened it was the custom and practice for a man to be on the leading car with a light (R. 60). James Eade testified to the same custom and practice when cars were moved over the lead tracks (R. 69). Some of defendant's witnesses admitted this reasonable custom and practice. Yardmaster O'Haire admitted that hundreds of workmen crossed there right along, every week from day to day (R. 86), but refused to call it a path. He also admitted that it was the practice when cabooses were moved from the track south of Irving Park boulevard back over the lead up into the yard, to have a man placed on the rear end of the leading car, for main line movement and for public highways but contended that although trains come into that yard over those lead tracks those tracks could not be called main line tracks (R. 96).

Defendant's witness Ourada, testified that switchmen, railroad men and car repairers crossed that track day and night from the oil houses across to the depot; that he had seen them do it hundreds of times before the accident (R. 136). He said that there was no one riding the head end of the cut of cabooses as he shoved them north over this track, and that although he had but two cabooses coupled to his engine he did not see the plaintiff at all before he was hit (R. 138).

Defendant's witness, John B. Hamilton, testified in direct examination that the universal practice or custom when backing cabooses over this track across Irving Park boulevard, a public highway, then down through this old yard lead track, with the intention of kicking the two cabooses onto a yard track, "is that a white light must be displayed on the front end of the lead car while going

over a crossing and over the main line *back to the yard tracks—the inside tracks*" (R. 152), and then later sought to qualify his statement by making a difference between the two lead tracks at the place where the accident happened that run parallel with and adjacent to the main line tracks and those main tracks.

Witness Banning, called by defendant, testified that in shoving these cabooses along a track at this place, they would have somebody on the hind end looking out, knowing that dozens of employees at all hours of the day and night were crossing over this lead (R. 160).

Jerry O'Conner, a switchman, testified that he had made similar switching movements with cabooses many times and that they *kept a lookout on them* when passing along, just north of Irving Park boulevard, where men cross and re-cross all the time; that it was customary to keep some lookout ahead where these men crossed from the depot and the yard office over to the car repairers' shanty, the oil house and the eating house, when shoving cabooses along there (R. 247).

It is admitted that there was no warning of any kind whatsoever from the caboose train and it is a fair inference that if the slightest precaution had been taken by having a light or a man on the foremost caboose, the cabooses would either not have been moved or could have been stopped in time to have avoided the accident, or the plaintiff could have been warned of their approach. Under the testimony just reviewed, we submit, that the Appellate Court of Illinois was clearly right in holding that (R. 282)

> "Without passing upon the contention of the defendant that the testimony of the plaintiff as to the light is without corroboration in the evidence, nevertheless, if it be assumed that the light was dim, still, as we

read the record, the plaintiff made out a clear *prima facie* case of negligence against the defendant."

Plaintiff testified that bright headlights on locomotive engines were never used under the circumstances and conditions that prevailed at the time he was hurt (R. 45). He admitted that he knew that "once in a while" cabooses were handled without having a lookout man with a light on the foremost end (R. 36). There was no regular time for making this caboose movement (R. 35) and he had no reason to know when he passed in front of the transfer engine with its bright headlight that this particular caboose train would be started from a standing position without warning and without a light or lookout upon it.

Defendant was also charged with negligence in operating the Belt transfer train over this track without dimming the headlight on the locomotive, so that by reason thereof, plaintiff's vision, as he looked down the track was so interfered with that he did not and could not see these unlighted cabooses coming toward him. Plaintiff testified that this bright headlight was on and that *after* he crossed the track on which the transfer train was moving, that *then* he attempted to look to the south and that the rays of the light so dazzled him that he could not see (R. 24). His testimony in this regard is absolutely unimpeached by earlier contrary statements made by him. He is corroborated as to the dazzling headlights by defendant's witness Eicha, fireman on the Belt transfer train, although this witness apparently did not intend to admit the truth of the matter. Eicha testified that as he rode upon this northbound engine, he saw the plaintiff coming across a vacant lot 150 feet west of the track on which his train was running. He testified that it was a dark night. When asked how he could see him so far west of the track, he said that

"a bright light would light it up as clear as day" (R. 145). Immediately after making that statement, when asked what he meant by his answers, he said that he meant *if the bright light had been on it would have lighted it up as bright as day.* He said that he was able to see plaintiff *because plaintiff carried a switchman's lantern* (R. 146)—while just a few minutes before in direct examination he said that when he saw plaintiff coming he was *"not carrying a lantern"* (R. 143). Everyone knows that the ordinary switchman's lantern is used primarily for signalling and that it would not illuminate to any such degree. This same witness testified that the reason he was positive that the bright headlight was dimmed was because it was their practice to dim it every night; that *"they are supposed to do it. I guess many times some of them don't"* (R. 148).

Defendant's witness Ourada also testified that the headlight on the Belt run engine was dim, although he was on another engine and had no particular reason to observe this train on another track. Several months after the accident this witness made a statement to an investigator for plaintiff and in it stated that he did not know whether the headlight on the Belt train engine was dim or bright as he did not notice or see it (R. 249).

Defendant's witness, Fitzgerald, was working at the time as one of the switchmen in the crew that shoved the cabooses. On direct examination he testified that he was *pretty sure* the headlight on the locomotive drawing the other train was dim (R. 185) and on cross-examination admitted that he and the other witnesses had discussed the question as to whether that headlight was dim or bright since the trial had begun and then said that *at this discussion they all agreed about the matter* (R. 190). This same witness, several months before the trial, gave to plaintiff's investigator a statement in which he said "it is a

custom to dim electric headlights in pulling into the yard, but whether or not this Belt drag engine had its headlight dim *I could not say as I did not notice*" (R. 250).

If the testimony of these various witnesses called by the defendant is read it will be observed that most of them who testified that the headlight was dim had no specific recollection of that particular night and that their testimony was based on what *was usually done and what was supposed to be done* in that particular, rather than on any distinct recollection about that particular headlight on that particular night.

With this testimony from witnesses, some of whom were impeached and some of whom admitted that they were testifying from what was "supposed" to have been done rather than what they actually saw done, no rule of law would have justified the reviewing court of Illinois, without opportunity to see and observe the demeanor of the witnesses as they testified, had it set aside the verdict of the jury, approved as it was by the trial judge in entering a judgment upon it.

Defendant's contention on page 37 of its brief to the effect that a light on the foremost caboose and a man placed there as a lookout would have been no avail to plaintiff, is based on mere guess and conjecture. Plaintiff crossed about 75 feet in front of the engine with the bright headlight (R. 24) and if the headlight blinded him it would also serve to make him visible to the lookout man,—had there been one there,—on the rear of the foremost caboose as it was standing on the next track 15 to 17 feet east of the track over which the engine with the bright headlight was moving. A lookout man upon that caboose could have plainly seen plaintiff in ample time to have prevented the caboose train from starting, to have stopped it after it had started, or to have warned plaintiff of its approach.

We submit that it cannot be said that the weight of the evidence as to defendant's negligence is so clearly and manifestly contrary to the finding of the jury and the trial court's action in entering judgment upon that finding, as to warrant a reversal on the weight of the evidence. Courts have so frequently held that a reviewing court ought not to set aside a verdict and judgment on the ground that it is against the weight of the evidence unless it is *clearly, palpably and manifestly so*, that we believe it unnecessary to cite decisions on that subject.

IV.

The law as to defendant's negligence.

There is a clear conflict in the testimony in regard to the custom and practice of posting a lookout man on the forward end of cabooses being shoved along the lead track at the place of the accident, and upon the question as to whether the locomotive headlight on the transfer train was dimmed, in accordance with the admitted custom and practice. The most recent pronouncement of this court where evidence is conflicting is found in *Western & Atlantic Railroad* v. *Nora E. Hughes, Admrx.*, cause No. 234, United States Supreme Court, decided February 18, 1929. There this court said:

> "The evidence introduced by the plaintiff was substantial; and was sufficient, if believed, to sustain a verdict in her favor. There was much conflict in the evidence.
>
> "The first trial occupied five days. At the second trial 33 witnesses testified. Some of the testimony given by witnesses for the railroad would, if believed, have entitled it to the verdict as a matter of law.
>
> "Some of the testimony given by witnesses called by the plaintiff does not seem to us persuasive. But the credibility of the witnesses and the weight of the

evidence were obviously matters for the jury. The defendant was not entitled to a directed verdict."

The first count of plaintiff's declaration, as the Appellate Court of Illinois stated, is a general negligence count (R. 282). Under it proof that defendant moved the caboose train without bell, signal or warning and without a man or light at the forward end was admissible. The third count charged negligence in operating an engine with cabooses attached to it over said track without keeping any lookout so as to have discovered the plaintiff crossing the track there, although defendant knew or in the exercise of ordinary care ought to have known that plaintiff and other workmen were or might be crossing at this particular place (R. 5). The evidence establishes beyond any doubt the fact that many employees crossed and re-crossed these tracks at all hours. The evidence is also clear that at this point trains were not made up and broken up and that cars were not switched about at that place; that trains passed there on their way to the north end of the yard; and that the caboose movements along the tracks at this place were comparatively few for the reason that it was only necessary to place one caboose at the south end of each train after it had been made up by the switching work done at the north end of the yard. Under these circumstances the ruling in *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408, 417, is applicable. There it was said:

> "What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men,

under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court."

In *Koennecke* v. *Seaboard A. L. Ry. Co.*, 101 S. C. 86, 85 S. E. 374 (affirmed 239 U. S. 352), the court was called upon to decide if actionable negligence had been shown in operating a switch engine in a yard without light or signals. The Supreme Court of South Carolina, on page 109 of its opinion, said:

"We cannot assent to the view that, under no circumstances, is it the duty of the crew of a switching engine, moving in a switching yard, to give signals of its approach for the benefit of other employees working in the yard, even though they may know that it is moving about the yard and be under the duty of looking out for it."

In affirming judgment for the plaintiff in this *Koennecke* case (239 U. S. 352) this court distinguished the case from *Aerkfetz* v. *Humphreys*, 145 U. S. 418, and said:

"We see equally little ground for the contention that there was no evidence of negligence. It at least might have been found that Koennecke was killed by a train that had just come in and was backing into the yard, that the movement was not a yard movement, that it was on the main track, and that there was no lookout on the end of the train and no warning of its approach. In short, the jury might have found that the case was not that of an injury done by a switching engine known to be engaged upon its ordinary business in a yard, like *Aerkfetz* v. *Humphreys*, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835, but one where the rules of the company and reasonable care required

a lookout to be kept. It seems to us that it would have been impossible to take the case from the jury on the ground either that there was no negligence or that the deceased assumed the risk."

In *Bombolis* v. *Minneapolis & St. L. R. Co.*, 128 Minn. 112, 150 N. W. 385 (affirmed 241 U. S. 211, 60 L. ed. 961), plaintiff's intestate was killed while at work repairing a track. A train signaled its approach on one track and the intestate stepped back near to another track, and was struck by a switch engine that approached without warning of any kind. Judgment for plaintiff was affirmed, the salient points applicable to the case at bar being stated by the state court as follows:

"The negligence alleged and relied on is the failure of the switch engine crew to give the men working between the tracks a warning of its approach. No such warning was in fact given, or at least the jury was abundantly justified in so finding. There was testimony by at least four witnesses that it was the custom to give warning of the approach of a switch engine whenever there were men working on the track. *We think that the question whether the engineer of the switch engine was negligent in not ringing his bell as he approached these men was for the jury, and that the evidence sustains the verdict on this issue.* It is urged that the engineer ought not to have anticipated that the men working on the main track would take a position on or so near the lead track as to be in danger from the switch engine. But their work required them to be between the main track and the lead, the freight train was approaching on the main track, and the men were getting out of its way. *It is not going very far or imposing a very onerous duty to hold that the engineer should have rung the bell.*"

In *Lake Shore & M. C. Ry. Co.* v. *Enright*, 237 Ill. 403, a fireman, crossing tracks at a place *where employees*

habitually crossed to get drinking water, was injured when struck by an engine backed up without warning or lights. In affirming judgment for plaintiff the court held that the questions of defendant's negligence and the plaintiff's contributory negligence were for the jury and that under the circumstances "appellant owed appellee the duty of exercising reasonable care and caution not to injure him. • • •"

In *Philadelphia B. & W. R. Co.* v. *Tucker*, 35 App. D. C. 123 (affirmed without opinion, 220 U. S. 608), plaintiff's intestate was fatally injured when struck by a train while crossing defendant's tracks *along a pathway which had long been used by employees* going to and from work. He was aware of the fact that trains and cars might move along these tracks at any time. In affirming a judgment in his favor the court held that whether the defendant had provided a safe "way" for its employees was for the jury, and that the long continued practice of the employees in using this pathway over the tracks "was with the knowledge and consent of the defendant."

Under the Federal Employers' Liability Act upon which the instant suit is based the defendant is liable for any "defect or insufficiency" in its "ways" due to its negligence, and the pathway used by the plaintiff at the time he was injured was clearly a "way" within the meaning of the federal act.

In *Farris* v. *Southern Ry. Co.*, 151 N. C. 483, 66 S. E. 457, the employee was crossing defendant's tracks in the yards proper on his way to work, *and the defendant knew and had for a long time acquiesced in the use of this pathway by its employees.* He was struck by four cars kicked along the track without any warning being given and without anyone riding these cars. A judgment for plaintiff was affirmed.

In *Cincinnati, etc., R. R. Co.* v. *Mayfield's Admr.*, 145 Ky. 305, 140 S. W. 310, the intestate was killed while crossing tracks over *a route habitually used by employees*. The engine that struck him gave no signal and carried no warning lights. Judgment for the administrator was affirmed, the court holding that the defendant should reasonably have anticipated the presence of persons at that particular place, and was negligent in failing to give a warning of the approach of the locomotive engine.

In *Hudson* v. *Seaboard A. L. Ry. Co.*, 176 N. C. 488, 97 S. E. 388, an employee was injured while upon tracks where employes customarily crossed in a crowded yard. He was struck by an engine that sounded no signals and did not have a lookout on it as it backed through the yard. The defendant contended that it was not negligent and that the employee assumed the risk of injury. In the course of its opinion the court cited the *Kocnaecke* case (239 U. S. 352), and the *Pucucker* case (244 U. S. 320), and held that "backing a train without a lookout on the rear end without notice of its approaching along a track which employees and others are accustomed to pass over, is negligence" and that it was for the jury to say whether harm or injury to someone might be anticipated as a result of the failure to have a lookout at the rear of the backing engine so that the employee could have been seen and warned.

In *Westcott* v. *Chicago, G. W. R. R. Co.*, 157 Minn. 325, 196 N. W. 272, defendant's employees had crossed and recrossed tracks in defendant's yard in the neighborhood of the roundhouse for so long a time that, as the court said, "a jury might well find that appellant knew of it and consented to it." Plaintiff's intestate was on his way to the roundhouse, crossing *the tracks at the customary place*, when fatally injured by some cars kicked, without warning, in upon one of the tracks. In affirming a judgment for

plaintiff and in answer to defendant's contention that there was no negligence shown, the court held that the notice of the custom of employees to cross the tracks at this place was imputable to the defendant and that it was its duty to use ordinary care to protect employees crossing at that point from injury.

In *Lexington & E. Ry. Co.* v. *Smith's Admr.*, 172 Ky. 117, 188 S. W. 1091, Smith was struck and killed in a yard at a point *where employees "were constantly passing to and fro* and engines and trains constantly moving about." Defendant failed to have anyone riding on the front end of a caboose that was backing along the track so as to give warning. In answering the defendant's contention that it was not guilty of negligence the court stated that it "is very plain that if there had been some person for example, the brakeman, who was on the engine pilot on the front end of this caboose, he could have warned Smith in time to have enabled him to leave the track before being struck"; and that if Smith was guilty of contributory negligence on standing on the track so was the defendant guilty of negligence in failing to have some person on the front end of the caboose; that this joint and concurring negligence of both parties brought about the death of the employee.

The Supreme Court of Missouri, in *Greenwell* v. *Chicago, M., St. P. Ry.*, 224 S. W. 404, affirmed a judgment for an engineer who was injured while on his way across the tracks in a yard to the depot where he was to obtain a certain bulletin. *Employees were obliged to and frequently did cross the tracks at this place.* In answering the railroad company's contention that it was not guilty of negligence in failing to warn or in failing to have a man at the foremost end of the car that was being backed up and which struck plaintiff, the court said:

> "Where employees are expected to be passing across tracks, such as the plaintiff crossed in this case, it is the duty of those running trains or engines along that way to look out for danger to such persons and give appropriate warning to prevent injuring them."

Practically all of the foregoing cases cited, pass upon the duty of a railroad company to its employees who customarily and habitually cross yard tracks at a given place and under circumstances such as appear in the case at bar. In some of the following cases it is not clear from the opinions and the facts stated therein whether the employee was crossing tracks under circumstances such as confronted the plaintiff in the present case. We submit, however, that the principles announced in them are pertinent to the issues here presented. One of them is *Frazier* v. *Interstate R. R. Co.*, 264 Fed. 96 (Court of Appeals, Fourth Circuit). There an interstate switchman, after making a coupling between two cars stepped back upon an adjacent track and was struck by an engine with a freight car in front of it, which came upon him without warning, and without a light upon the car. The declaration alleged all of these facts and the trial court sustained defendant's demurrer on the authority of *Aerkfetz* v. *Humphries*, 145 U. S. 418, 36 L. ed. 758. Plaintiff stood by the demurrer and took the case up for review. The Circuit Court of Appeals reversed the trial court and in so doing said (Opin. 98):

> "Both authority and reason are against the proposition that the crew of a switch train, or any other train, can be judicially declared as a matter of law to be without fault in running along an adjacent track under such conditions as here appear, without showing a light or sounding a bell or whistle or having a lookout. Upon proof of the allegations of the declaration, it will be for the jury to say whether the proximate cause of the casualty was solely negligence of the defendant, or of the plaintiff, or the two combined, or inevitable acci-

dent. Among the cases sustaining this conclusion we cite: *Norfolk & Western Ry.* v. *Earnest*, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. ed. 1096, Ann. Cas. 1914C, 172; *Chicago, Rock Island Ry.* v. *Wright*, 239 U. S. 548, 36 Sup. Ct. 185, 60 L. ed. 431; *Erie R. R. Co.* v. *Purucker*, 244 U. S. 320, 37 Sup. Ct. 629, 61 L. ed. 1166; *Toledo, St. L. & W. R. Co. et al.* v. *Bartley*, 172 Fed. 82, 96 C. C. A. 570; *Southern Ry. Co.* v. *Smith*, 205 Fed. 360, 123 C. C. A. 488; *Southern Ry. Co.* v. *Darnell's Admx*, 114 Va. 312, 76 S. E. 291; *Harwick* v. *Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328. Reversed."

In *Delaware L. & W. R. Co.* v. *Hughes*, 240 Fed. 941, the Circuit Court of Appeals, Second Circuit, affirmed a judgment for the death of a railroad switchman killed while at work in defendant's yards. The intestate was an experienced man and thoroughly acquainted with the premises. He was hit by a moving car which plaintiff's evidence showed was "*improperly managed in that there was no watchman at or near to its end with a signal lantern to warn those who had a right to be on the track of an approaching car.*" In holding the defendant negligent the court said that although the accident happened in the yard limits, "it was the duty of the defendant to give adequate warning of the approach of the car" and quoted with approval the syllabus in *Southern Ry. Co.* v. *Smith*, 205 Fed. 360, 123 C. C. A. 488, as follows:

> "While it is primarily the duty of a switchman in railroad yards to be on the lookout and keep out of the way of moving engines, there is a concurrent or secondary duty, independent of statute or rule, on the part of those in charge of such moving engines to keep such lookout as is reasonably necessary to avoid injury to an employe who may neglect to protect himself, and the extent of such duty is measured by the peculiar circumstances of the case."

In *Union Pacific Ry. Co.* v. *Elliott*, 54 Neb. 299, 74 N. W. 627, it was said that, (Opin. 305)

> "Irrespective of a statute, the starting or running of a switch engine, in a switchyard filled with a network of tracks upon which cars and engines are constantly moving and in which yard men are constantly at work, without the ringing of a bell or blowing of a whistle, is evidence of negligence."

In *Kalashian* v. *Hines, Director General*, 171 Wis. 429, 177 N. W. 602, plaintiff sought to recover damages under the Federal Employers' Liability Act for injuries he sustained while crossing defendant's tracks at a place where he knew switching operations were in progress. He was struck by a switch engine *as it moved from a standing position about sixty feet away from him without any warning.* The court affirmed the judgment for him, stating that the questions whether defendant was negligent and whether the plaintiff was guilty of contributory negligence that would mitigate damages under the Federal Act, were for the jury.

V.

Defendant was negligent in failing to dim the locomotive headlight.

Defendant practically admits that it would be negligence to operate a transfer engine at the place and under the circumstances in question without having the headlight upon it dimmed, in accordance with the admitted custom and practice. Defendant's witness Eicha corroborated plaintiff on the headlight question when he stated that he saw the plaintiff before he reached the tracks and some distance away, even though the night was dark, the witness stating that "a bright light would light it up as clear

as day" (R. 145). Other witnesses called by defendant, as heretofore pointed out, did not know whether the headlight was bright or dim, while others said that it was dim because it was customary to dim it upon entering the yard and that they had no particular recollection on the question as to this particular night. Under the law, as stated in *Chicago, M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472, 474, this court will only reverse a case where from an examination of the record, "it is found that *as a matter of law* the evidence is not sufficient to sustain" a judgment.

There is no denial of the general custom and practice by virtue of which locomotive headlights were dimmed when approaching the place where plaintiff was injured. The substance of defendant's argument is that this court should say that the jury, the trial court and the reviewing court of Illinois, should have believed the testimony of its employees, instead of the testimony of plaintiff, and his witnesses.

In *Roach* v. *Great Northern Ry. Co.*, 133 Minn. 257, 158 N. W. 232, a judgment was affirmed for the death of a switchman who was run over by a car shunted onto a side track by a switching engine, the accident being due to the fact that he was blinded by the rays from a bright headlight such as is used upon engines in road service. The court there said:

> "Whether such use constituted negligence was submitted to the jury. The evidence is that such a headlight blinds and dazzles the eye so that one is unable to see objects distinctly or measure distances accurately. This is common knowledge. Switchmen work on and about the cars and engines in the yard and must be able to see clearly and to measure distances accurately. We are of the opinion that the jury's finding of negligence is supported by the evidence."

VI.

The evidence on the question of assumed risk and the law applicable thereto.

Much of the argument advanced by defendant confuses the doctrine of assumed risk with that of contributory negligence. If plaintiff, seeing this approaching train with the locomotive headlight undimmed, acted carelessly in crossing in front of it, such conduct on his part would amount to contributory negligence only and the assumed risk doctrine would not apply. He certainly was aware of the defendant's negligence in failing to dim the headlight, but he did not know and he was not called upon to anticipate that there would be a negligent movement of a locomotive with cabooses attached to it on the next track. He had no knowledge that the defendant would start and move these cabooses that had been standing there attached to a locomotive engine, without ringing the bell or without having a light upon the foremost caboose and a man riding it to give warning to employees who habitually crossed there. The burden of proving that plaintiff knew and appreciated the danger to be incurred on the track upon which he was hit was upon the defendant under the governing decisions of this court in construing the Federal Employer's Liability Act.

This court has repeatedly held that before a plaintiff can be barred on the ground of assumed risk as a matter of law, the danger to him must have been so *imminent and immediately threatening* that no reasonably prudent man under the same circumstances and conditions would have confronted it. *Seaboard Air Line* v. *Horton*, 239 U. S. 595.

In the case at bar it cannot be said as a matter of law that the danger to plaintiff in crossing these tracks as he did, was so imminent and so immediately threatening that a reasonably prudent man would have remained away from

his work and his crew awaiting him while a train of eighty cars moving at three miles per hour passed him. Figuring the average length of a car as forty to forty-five feet (R. 229), this approaching train of eighty cars was over a half mile long. All the witnesses agree that it was moving from three to five miles an hour. It would have taken over a half hour for this train to have passed. Plaintiff's twenty minute lunch period was about up and he did what an ordinarily prudent employee would have done in crossing in front of this oncoming train with the undimmed locomotive headlight and which would have delayed him a half hour if he had waited for it to pass. The cabooses offered no danger while standing there and if the bell on the engine that shoved them north had sounded or any lookout at all had been kept, as plaintiff had a right to assume would be done in accordance with the usual custom and practice, the accident would have undoubtedly been avoided.

In *Erie Railroad Company* v. *Purucker, Admx.*, 244 U. S. 320, the employee, a track laborer, sustained fatal injuries as he was walking along defendant's double track line on his way to work. In order to let a train pass over the track upon which he was walking he stepped upon the other track and was struck by an engine backing over that track. There was no signal or warning from the backing engine and the engineer and fireman did not see the man before he was struck. Recovery was affirmed, the principal point decided by this court being that since the undisputed testimony was to the effect that the engine ran into the intestate without signal or warning to him, that then,

> "Under such circumstances the injured man would not assume the risk attributable to the negligent operation of the train, if the jury found it to be such, unless the consequent danger was so obvious that an ordinarily prudent person in his situation would have observed and appreciated it."

In *Chesapeake & O. R. R. Co.* v. *De Atley*, 241 U. S. 310, the plaintiff in the line of his duty was required to board a moving train, and defendant's engine men knew that he was obliged to get aboard as it passed him. On review in this Court it was contended that he assumed the risk of injury in getting on the train and that if it was "moving slowly the risk is an ordinary one incident to the business of railroading; while if it is moving rapidly, the risk is open, obvious and apparent." This Court said on page 317 of the opinion:

> "We are unable to concur in the view that there was no question for the jury. Whether the risk was an extraordinary risk depended upon whether the speed of the train was greater than plaintiff reasonably might have anticipated; and this rested upon the same considerations that were determinative of the question of the engineer's negligence. If the jury should find, as in fact they did find, that the speed of the train was unduly great, so that the risk of boarding the engine was an extraordinary risk, the question whether plaintiff assumed it then depended upon whether he was aware that the speed was excessive, and appreciated the extraordinary danger; or, if not, then upon whether the undue speed and consequent danger to him were so obvious that an ordinarily prudent person in his situation would have realized and appreciated them. * * *."

In *Gila Valley, etc. Ry. Co.* v. *Hall*, 232 U. S. 94, the plaintiff was injured by reason of a defective third wheel, or pony wheel on a three-wheeled railway gasoline track velocipede. The defect in the flange of the pony wheel was in plain sight and because of it the car was derailed and the plaintiff injured. There was no promise to repair made by defendant or peremptory order to the plaintiff to use this car. In affirming a judgment for the plaintiff this court stated that a verdict "could not properly have been di-

rected for defendant upon the ground that plaintiff, in using the car, had assumed an obvious risk * * *." In the course of the opinion it was said (page 102):

> "Moreover, in order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person, under the circumstances would have appreciated it."

Further in the course of the opinion it appears that the defendant had asked the trial court to give an instruction to the effect that it was the duty of the plaintiff to exercise ordinary care to have discovered this defect, and that if he had not done so he should be held to have assumed the risk. This court said that the instruction asked was properly refused and that the one given in which it was said that,

> "The true test is not in the exercise of ordinary care to discover dangers, by the employee, but whether the defect is known or plainly observable by him. An employee is not charged by law with the assumption of a risk arising out of defective appliances provided by his employer, unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incident to the use of such appliances,"

was a correct statement of law.

In *Central R. R. Co. of N. J.* v. *Colasurdo*, 192 Fed. 901, the plaintiff was at work in the night time repairing a switch in defendant's yards, and was injured when struck by certain unlighted cars, as they were kicked back along the track without warning. In affirming judgment for plaintiff, the court refused to hold that although plaintiff knew cars might be moved over this track, he assumed the

risk of such movement being made without warning. The court said:

> "We cannot believe that the risk of being injured in this manner, while engaged in discharging his duty, was assumed by the plaintiff. He assumed the usual and ordinary risks of the calling, but when ordered to repair a track at night he had a right to assume that some precaution would be taken to guard him against extraordinary danger. If a watchman were not stationed to warn him of the approach of trains, he at least had a right to expect that a train would not back down upon him with no notice of its approach and no attempt to apply the brakes until only eight feet distant."

The Supreme Court of Nebraska, in *Engel* v. *C. B. & Q. R. R. Co.*, 111 Neb. 21, 195 N. W. 523, following the rule announced in *Chesapeake & Ohio Railroad Co.* v. *DeAtley*, 241 U. S. 310, affirmed a judgment in favor of the administratrix of an employe who was killed in the yards when struck by an engine backed along one of the tracks. The court found from the evidence that the defendant and its employees on the locomotive "knew that deceased and the gang of men under him were constantly crossing and recrossing the tracks at the place where the accident occurred, and that locomotives were traveling backward and forward on the many tracks in the yard; and that the deceased in doing such work, knew that the tracks were a place of danger at all times." As in the case at bar, no warning of the approach of the engine was given, and no one on it saw the plaintiff. The court in affirming the judgment, said (Opin. 32):

> "It was the duty of deceased to watch for dangers and protect himself against them, if possible, and to exercise great vigilance in looking out for approaching engines and trains, but it was also the duty of the rail-

road company and its employees to use due care and caution for the safety of the employees; and where a railroad company knows that its employees are engaged in work on or about its tracks, it is its plain duty to maintain a careful lookout for such employees to prevent injuring them. Because the deceased had been employed by the railroad company for 22 years, a part of which time as foreman of a gang of men, and was aware of the many dangers incident to such employment, these facts did not authorize the railroad company to operate its engine and tender negligently and without regard to his safety or without using the ordinary care which an individual is obliged to use, under like circumstances, for the protection of his employees. The deceased had a right to presume that those operating the locomotive would use proper care and caution for his safety, that they would maintain a careful lookout to prevent injuring him, and that they would take the reasonable, ordinary and usual precautions necessary to protect him in his employment. It cannot be claimed that under the Federal Employers' Liability Act an employee assumes the risks of the negligence of the employer or of the employer's employees or agents, at least until knowledge of the particular negligence which caused or was liable to cause the injury is brought to his attention."

The case of *Indiana, I. & I. R. R. Co.* v. *Ottstot*, 212 Ill. 429, was decided prior to the enactment of the Federal Employers' Liability Act. Plaintiff, while repairing a track, was injured when struck by a backing locomotive moved without warning. Defendant claimed there was no evidence of its negligence, and that the plaintiff was guilty of contributory negligence, and had assumed the risk of injury from moving trains and engines. Plaintiff knew that the engineer in charge of this particular engine had frequently moved engines along the tracks there without sounding the whistle or ringing the bell, and defendant claims that, know-

ing of this negligence on the part of the engineer, plaintiff assumed the risk of injury by reason of it. In affirming judgment for plaintiff, the court said (Opin. 434):

> "While appellee knew that Munaw moved the engine through the yards with bell and whistle both silent, we do not think it can be said, as a matter of law, that he thereby assumed the risk that Munaw would deliberately start an engine and run it upon men who he knew were working on the track at a point not more than two hundred feet from the starting place of the engine, without giving them any warning whatever."

Reasonably it cannot be said that the plaintiff, in the instant case, assumed the risk of this caboose movement when the locomotive engine attached to those cabooses started up from a position, according to defendant's conductor, Hudson, not over thirty-five feet away from where plaintiff was crossing, without sounding any warning or giving any signal of its start or of its approach, and when plaintiff did not know or have a reason to believe such a negligent movement was about to be made. He could not assume the risk of defendant's negligence until he knew of that negligence, and appreciated the dangers arising by reason of it.

In *Roach* v. *Great Northern Ry. Co.*, 133 Minn. 257, 158 N. W. 232, a switchman was fatally injured when blinded by a bright locomotive headlight in a switching yard. A judgment for the administratrix was affirmed, the court holding that:

> "The deceased had worked in the yards and about such headlights for a considerable time. The defendant claims that as a matter of law he assumed the risk of their use. The question of the assumption of risks was submitted to the jury and its finding negatived such assumption. While the deceased must have been aware of the kind of headlight used or at least that it was a bright, strong light, we are not prepared

to say that as a matter of law he appreciated the danger and assumed the risk. The question was for the jury."

VII.

Cases relied upon by defendant.

Defendant relies principally upon two cases, *Aerkfetz v. Humphreys*, 145 U. S. 418, and *Toledo, St. Louis, Western Railroad Company* v. *Allen*, 276 U. S. 165. It is our position that the facts in each of those cases are so materially different from the facts in the case at bar, as to make them inapplicable.

The *Aerkfetz* case was not predicated upon the Federal Employers' Liability Act. Aerkfetz was a track laborer in the yards where there were twelve tracks and side tracks. The court specifically states that "the yard was used for the making up of trains. A switch engine was employed therein and, as might be expected, *was constantly moving forwards and backwards, changing cars and making up trains.*" Aerkfetz was injured by this engine pushing two cars slowly along the track so that they struck him as he stood with his back to the approaching cars. There was no evidence whatever of a violation of the custom as in the case at bar.

Plaintiff in the case at bar was not injured at any such place. While within the yard limits, nevertheless there were but five tracks at the place of the accident, one being a spur known as the ice-house track, the others being two main line tracks and two lead tracks. The work of plaintiff and his crew was done "at the north end of the yard, switching cars and making up trains" (R. 21). About 8:30 in the evening they left their work up there and came down to the depot at the south end of the yard, shown in Defendant's Exhibit No. 1 (R. 78). Plaintiff walked to

the west across the tracks where he ate his lunch, and was injured while on his way back across the tracks to rejoin his crew. The record specifically shows that "trains are not made up there" (R. 74)—namely, at the south end of the yard. The tracks there were traversed by the main line through trains and transfer trains that pulled into the yard over the lead tracks on their way to the north end of the yard. Cabooses were moved over the tracks when needed to put upon the south end of the trains that had been made up on the yard tracks and which yard tracks started, according to the scale on Defendant's Exhibit No. 1 (R. 78), some distance north of the place where plaintiff was injured. There were thirteen or fourteen of these yard tracks. A far different situation is thus presented than that in the *Aerkfetz* case where a track laborer was injured while working upon one of twelve yard tracks where a switch engine "was constantly moving forward and backward changing cars and making up trains."

In *Toledo, St. Louis & Western Railway Company* v. *Allen*, 276 U. S. 165, the plaintiff was a car checker in its yard. There were a number of switch tracks that branched off from a lead track and cars *were constantly being kicked over the lead track in upon these various switch tracks in the process of making up and breaking up trains.* Allen's duties required him to be down among these switch tracks and as the court said "to go from place to place to check and list cars that had been switched and arranged on various tracks for the purpose of making up trains." At the time of the accident he was checking a string of cars on track No. 5 and was between it and track No. 4, and about 125 yards from the lead track. A switching crew was at work in the yard and an engine with twenty or twenty five cars attached to it was on the lead track. Some of these cars were kicked in onto track 4 and allowed to

move by their own momentum down along track 4. They struck the plaintiff as he was down 125 yards from the lead track at work as stated between track 4 and 5. Plaintiff knew that cars were constantly being kicked in upon these various tracks and he also knew that cars "were liable to be shunted without warning to him. This court specifically found that there was no violation of a custom or practice, for in the course of the opinion (page 171) it is stated that "in the absence of proof that he was exposed to some unusual danger *by reason of a departure from the practice generally followed*, it cannot be held that defendant was in duty bound to give him a warning."

A mere statement of the facts in the *Allen* case is sufficient, we submit, to differentiate it from the case at bar, where plaintiff was walking across tracks at a place where employees at all hours crossed on their way from the depot and defendant's offices, east of the tracks, over to the oil house, the restaurant and the car repairers' shanties, west of the tracks, and where there is abundant evidence of a violation of the custom and practice as to locomotive headlights, and as to a lookout and light on the forward caboose.

VIII.

Weight to be given concurring opinions of trial and Appellate Courts.

Bearing in mind that the trial court held the evidence in this case sufficient to go to the jury and that the Appellate Court concurred in the opinion of the trial court, the following statement in *Patton* v. *Texas & Pac. Ry. Co.*, 179 U. S. 658, is especially applicable:

> "It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact; and that ordinarily

negligence is so far a question of fact as to be properly submitted to and determined by them. *Richmond & D. R. Co.* v. *Powers*, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748.

Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the Judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions."

In the *Patton* case the trial court directed a verdict in favor of the defendant and this action was approved by the Appellate Court and later by the Supreme Court.

In the case of *The Supreme Lodge K. of P.* v. *Beck*, 181 U. S. 49-50, the trial court refused to direct a verdict in favor of the defendant and its action was affirmed by the Appellate Court. When the case came before the Supreme Court of the United States, Mr. Justice Brewer, speaking for the court, said:

"We have recently had before us a case, coming like this from the trial court through the Court of Appeals (*Patton* v. *Texas & P. Ry. Co.*, 179 U. S. 658, *ante* 361, 21 S. C. 275), in which the action of the trial court in directing a verdict was vigorously attacked as an in-

vasion of the province of the jury to determine every question of fact. That case stands over against this, for there the trial court directed a verdict. Here it refused to direct one. In each case its action was approved by the Court of Appeals. In that case, although the question was doubtful, we sustained the rulings of the lower courts, and the considerations which then controlled us compel a like action in the present case."

It is to be noted that the court in the *Beck* case seemed to be of the opinion that in the *Patton* case "the question was doubtful"—being the question of the right of the court to direct a verdict for the defendant—but its action was sustained because of the fact that it was concurred in by the lower Appellate Court.

In the absence of clear and palpable error, this court will not disturb the concurrent findings of trial and Appellate Courts of the states upon the mere sufficiency of the evidence concerning negligence and assumption of risk in a case under the Federal Employers' Liability Act.

Baltimore & Ohio R. R. Co. v. *Watacre*, 242 U. S. 169.

Great Northern Ry. Co. v. *Knapp*, 240 U. S. 464.

Erie R. R. Co. v. *Welsh*, 242 U. S. 303.

Seaboard Air Line v. *Padgett*, 236 U. S. 668.

If this court should hold that it has jurisdiction in this cause and that the writ of certiorari was not improvidently granted, then we submit that the relation of master and servant did exist between the plaintiff and the defendant; that there is in the record sufficient evidence of defendant's negligence to support the judgment; and that the question of plaintiff's assumption of risk was properly submitted to the jury.

We ask that the case be dismissed for want of jurisdiction; or, if jurisdiction exists, that the judgment for plaintiff be affirmed.

Respectfully submitted,

Robert P. Patterson

Counsel for Respondent, John Rock,
155 North Clark Street, Chicago, Illinois.

See 14 Minnesota Law Review —

SUPREME COURT OF THE UNITED STATES.

No. 454.—October Term, 1928.

Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Petitioner, vs. John Rock.	Certiorari to the Appellate Court of the First District, State of Illinois.

[May 13, 1929.]

Mr. Justice Butler delivered the opinion of the Court.

Respondent sued petitioner in the circuit court of Cook County, Illinois, under the Federal Employers' Liability Act, U. S. C., Tit. 45, §§ 51-59, to recover damages for personal injuries sustained by him while employed in petitioner's railroad yard at Kolze in that State. There was a verdict for $15,000 in favor of respondent, and the judgment entered thereon was affirmed by the Appellate Court of the First District. 247 Ill. App. 600. Petitioner applied to the state Supreme Court to have the case certified to it for review and determination, but the application was denied.

Respondent asserts that the judgment is not one of the highest court of the State in which a decision in the suit could be had and that therefore this Court has no jurisdiction.

Section 120, ch. 110, Cahill's Revised Statutes of Illinois, the material parts of which are printed in the margin,* makes judgments

*"In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals and writs of error are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case . . . decided by them involves a question of such importance . . . that it should be passed upon by the Supreme Court, they may in such cases grant appeals to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court. . . ."

of the Appellate Courts final in all cases except those reviewable in the Supreme Court as a matter of right under the state constitution, those in which a majority of the judges of the Appellate Court make certificates of importance and grant appeals, and those brought up on writ of certiorari issued by the Supreme Court. This case is one in which the Supreme Court may issue writ of certiorari. *Kenna* v. *Calumet &c. R. Co.*, 206 Ill. App. 17, 44. The statute does not require one seeking review to apply to the judges of the lower court before presenting petition for certiorari to the Supreme Court. It is held by the state courts that a denial of petition for certiorari in a case where a certificate of importance has not been granted makes the judgment of the Appellate Court final. While such denial is not an approval of the reasons on which the Appellate Court rests its judgment, it is an approval of the conclusion reached by it "and is therefore, in effect, an affirmance of the judgment." *Soden* v. *Clancy*, 269 Ill. 98, 102. *People* v. *Grant*, 283 Ill. 391, 397. It would be unreasonable to require a defeated party to apply to the judges of the lower court for a certificate of importance and appeal after the Supreme Court had so approved the judgment.

The judgment is reviewable here. "Whenever the highest court of a State by any form of decision affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involves a Federal question, will, upon a proper proceeding, attach." *Williams* v. *Bruffy*, 102 U. S. 248, 255. And see *Gregory* v. *McVeigh*, 23 Wall. 294, 306.

We come to the merits. Respondent was an impostor. His true name is Joe Rock. He obtained employment and remained at work by means of deception and fraud. October 1, 1923, he applied for employment as a switchman in petitioner's yard at Kolze. In accordance with a rule and the practice of petitioner, respondent was sent to the company's physician for physical examination. It was found that he had been treated surgically for ulcer of the stomach and removal of the appendix and that at the time of the examination he had a rupture. His application was rejected because of his condition. A few days later, respondent under the name of *John* Rock, representing that he had not theretofore applied, again made application for such employment. Petitioner's superintendent was deceived as to respondent's identity and accepted him, subject to

examination to ascertain whether he was physically fit for such work, and sent him to the physician to be examined. Then respondent procured one Lenhart to impersonate him and in his place to submit to the required examination. The physician found Lenhart's condition satisfactory; and, believing that he was the applicant, reported favorably on the application. As a result of the deception petitioner gave respondent employment and it did not learn of the fraud until after December 24, 1924, the date on which respondent was injured.

We are called upon to decide whether, notwithstanding the means by which he got employment and retained his position, respondent may maintain an action under the Federal Employer's Liability Act.

The Act abrogates the fellow-servant rule, restricts the defenses of contributory negligence and assumption of risk, and extends liability to cases of death. And respondent in this action seeks, in virtue of its provisions and despite the rules of the common law, to hold petitioner liable for negligence of his fellow servants and notwithstanding his own negligence may have contributed to cause his injuries. Since the decision of this Court in the *Second Employers' Liability Cases*, 223 U. S. 1, 48, 51, it has been well understood that the protection of interstate commerce and the safety of those employed therein have direct relation to the public interests which Congress by that Act intended to promote. *Phila., Balt. & Wash. R. R.* v. *Schubert*, 224 U. S. 603, 614. *Watson* v. *St. Louis, I. M. & S. Ry. Co.*, 169 Fed. 942, 950. And see *McNamara* v. *Washington Terminal Co.*, 37 App. D. C. 384, 393.

The carriers owe a duty to their patrons as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service. The enforcement of the Act is calculated to stimulate them to proper performance of that duty. Petitioner had a right to require applicants for work on its railroad to pass appropriate physical examinations. Respondent's physical condition was an adequate cause for the rejection of his application. The deception by which he subsequently secured employment set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest because

calculated to embarrass and hinder the carrier in the performance of its duties and to defeat important purposes sought to be advanced by the Act.

The evils and disadvantages likely to flow from such impostures are the same in kind as those which invalidate attempts of common carriers by contract stipulations to escape liability for their own negligence in respect of duties essential to their public calling. In *Railroad Company* v. *Lockwood*, 17 Wall. 357, an action to recover damages by one injured while being transported on a railroad train in pursuance of an agreement purporting to exempt the carrier from responsibility for the negligence of itself or its employees, the court said (p. 377): "In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. . . . It is obvious . . . . that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the *essential duties* of his employment."

Respondent's position as employee is essential to his right to recover under the Act. He in fact performed the work of a switchman for petitioner but he was not of right its employee, within the meaning of the Act. He obtained and held his place through fraudulent means. While his physical condition was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such employment. It was at all times his duty to disclose his identity and physical condition to petitioner. His failure so to do was a continuing wrong in the nature of a cheat. The misrepresentation and injury may not be regarded as unrelated contemporary facts. As a result of his concealment his status was at all times wrongful, a fraud upon the petitioner, and a peril to its patrons and its other employees. Right to recover may not justly or reasonably be rested on a foundation so abhorrent to public policy. *Railroad Company* v. *Lockwood*, *supra*; *Great Northern Ry.* v. *Wiles*, 240 U. S. 444, 448; *Stafford* v. *Baltimore & Ohio R. R. Co.*, 262 Fed. 807.

We need not consider any other question.

Judgment reversed.